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WM. R. STANS

No. 209.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

GREAT NORTHERN RAILWAY COMPANY, PETITIONER,

v.

McCAULL-DINSMORE COMPANY.

UPON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DIRECTOR GENERAL OF RAILROADS AS AMICUS CURIAE.

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STATEMENT.

The Court has already granted the Director General permission to file a brief in this case as *amicus curiæ*. The object of filing this brief is to assist the Court in arriving at a correct construction of the law with regard to certain phases of the Fourth Section of the Act to Regulate Commerce. This is a very important question to the Director General because there are numerous cases involving similar questions pending against him in the lower courts and also two cases before this court which it is understood will be argued simultaneously with this case, namely, *Davis* v. *Parrington*, No. 123, October Term, 1923, and *Davis* v. *Portland Seed Company*, No. 114, October Term, 1923.

For the purpose of this brief it will be assumed that the application filed by the Great Northern Railway Company, page 15 of the transcript, did not protect the particular departure from the Fourth Section involved in this case in *Railroad Commissioners of Montana* v. *B. A. & P. Ry.*, 31 I. C. C. 641, cited at page 16 of the transcript. In other words, the argument is based upon the theory that the departures from the Fourth Section of the Act were not protected by application or order of the Commission. The brief will deal primarily with two questions, first, what constitutes a violation of the Fourth Section of the Act, and, second, what constitutes damage where there is a violation of the Fourth Section.

The shipments in this case moved from Benchland, Montana, to Minneapolis and Duluth, Minnesota, in 1913 and 1914. The rate charged was higher than the rate published from Billings, Montana, a more distant point than Benchland, Benchland being between Billings and Minneapolis and Duluth, and the route from Billings to those destinations was through Benchland. (Tr. p. 13.)

As this case involves only the long-and-short-haul clause of the fourth section, it might seem unnecessary to consider the subsequent clause of that section making unlawful a through rate in excess of the aggregate of intermediate rates subject to the act. The Director General, however, believes that a proper construction of the long-and-short-haul clause of the fourth section can not be arrived at without a consideration of the relation of that clause to the fourth

section as a whole, and of its interrelation with, as well as its difference from, the aggregate-of-intermediates clause. Furthermore, by a consideration of the fourth section as a whole, a consistency appears in its terms which is obscured by any attempt to consider its various provisions independently of each other. Indeed, the conflict of opinion in the Interstate Commerce Commission itself as to the proper construction of both clauses with reference to damages, as apparent from the various dissenting opinions whenever the construction of either clause has been attempted, would appear to arise from a disposition to construe the clauses not only as independent of each other, but apart from other provisions of the fourth section as well. On the other hand, since numerous cases under this section, involving several hundred thousand dollars to the government, are now or will shortly be before this Court, it is imperative for the protection of the government's interests that the relation of this case, which involves only the long-and-short-haul clause, be made clear to other cases involving the aggregate-of-intermediates clause, and to still others involving both clauses. The proper construction of the fourth section in connection with damages will, therefore, be discussed.

DAMAGES IN CONNECTION WITH FOURTH SECTION.

The Court can not keep too clearly in mind the fact that the theory underlying the case of the respondent (hereinafter referred to as the plaintiff), and the theory of the lower courts is that the rate legally

from Benchland, Mont., to Minneapolis and Duluth, Minn., and the rate which the carrier, therefore should have collected was not the higher rate actually published in the tariffs from Benchland to Minneapolis and Duluth, but was the lower rate published in the tariffs from Billings, Mont., the more distant point, to Minneapolis and Duluth. In other words, it is the plaintiff's contention, and the theory of the lower courts, that by applying the prohibition of the long-and-short-haul clause of the fourth section of the tariffs, the higher rate actually published from Benchland to Minneapolis and Duluth becomes illegal to the extent that it must be read out of the tariffs, and that, in like manner, the lower rate from Billings to Minneapolis and Duluth, though not actually published in the tariffs to apply from Benchland, must, in effect, be treated as actually published to that point and to be the only legally published rate from Benchland, and therefore the only rate which the carrier could legally collect under the provisions of section 6 of the Act to Regulate Commerce. In short, it is contended that the collection of the higher rate actually published from Benchland to Minneapolis and Duluth was a straight overcharge above what is contended to be the only legally published rate, the lower rate from Benchland to Minneapolis and Duluth, though this latter rate was never actually published from Benchland.

In this, as will subsequently be more fully shown, the plaintiff and both courts come into direct con-

flict with what would seem to be the conclusions necessarily to be drawn from numerous decisions of this Court, and particularly from its decision in the case of *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184. In that case this Court made clear that the paramount and controlling provision of the Interstate Commerce Act is the requirement of section 6 of that act that the actually published rate and no other be, under all circumstances, collected from all shippers alike, leaving a shipper the right, if such rate is unlawful under any other section of the act, to recover damages under the provisions of sections 8 or 16. Moreover, the plaintiff's contention is in direct conflict with the decision of the Interstate Commerce Commission in the case of *Iten Biscuit Co.* v. *C., B. & Q. R. R. Co.*, 50 I. C. C. 724, and with numerous other decisions and administrative rulings of the Commission, all recognizing as inflexible the requirement of section 6 that the actually published rate be collected and retained.

The decisions of this Court and of the Commission in this respect will subsequently be considered in some detail, but the Director General believes that it will conduce to a clearer understanding of his position if he first sets out briefly and without argument what he contends to be the correct construction of the fourth section with reference to damages, before attempting to set out the reasoning by which such a construction is reached, or the relation of such a construction to the decisions of the courts and of

the Commission. For convenience the fourth section has been appended in full to this brief.[3]

The Director General submits that the correct construction of that section with reference to damages because of violations thereof, or in connection with authorized departure therefrom, is as follows:

(1) That under any and all circumstances the published rate must be collected, whether that rate violates the long-and-short-haul clause because greater than the rate charged and received for a longer distance, or violates the aggregate-of-intermediates clause, because greater than an existing combination, but that, in either such event, a shipper may make claim for damages under sections 8 or 16 of the act. That under no circumstances is the charging and collecting of such published rate an overcharge in violation of section 6 but, on the contrary, is made mandatory by section 6 itself.

(2) That there is a fundamental distinction between what constitutes a violation of the long-and-short-haul clause on the one hand and a violation of the aggregate-of-intermediates clause on the other.

> (a) That the long-and-short-haul clause is violated only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance, and is not violated by the mere publication of a lower rate as applicable to the longer distance.

[3] The fourth section as appended is the fourth section as amended in 1910, and as in effect during the period of Federal control, and until amended at the termination of Federal control by the amendments of 1920.

(b) On the contrary, that the aggregate-of-intermediates clause is violated by the charging of a through rate greater than the published aggregate of intermediate rates, even though such intermediate rates are never actually charged or received.

(3) That while there is thus a distinction as to what constitutes a violation of the respective clauses, once a violation of either is established the measure of damages is substantially the same.

That is, that in the case of the long-and-short-haul clause the shipper is at least presumptively damaged to the extent of the difference between the higher rate charged and received for the shorter distance and the lower rate actually charged and received for the longer distance, while in the case of the aggregate-of-intermediates clause the shipper is presumptively damaged in the amount of the difference between the higher through rate charged and the lower aggregate of intermediates published. Moreover, that this damage exists in both instances without reference to either the reasonableness or unreasonableness of the higher or the lower rates.

(4) That there is no violation of the fourth section and therefore no question of damages under that section—

(*a*) Where, as to both the long-and-short-haul clause and the aggregate-of-intermediates clause, the Commission has, under the provisions of the fourth section, relieved the carrier from the operation of that section;

(*b*) Where, as to the long-and-short haul clause, even though the Commission has not granted relief, there is no proof that the lower rate was actually charged and received from the more distant point.

(5) That even where the fourth section is not violated, because of relief granted by the Commission from its provisions, or in addition, as to the long-and-short-haul clause, because no proof that the lower rate was actually charged or received from the more distant point, the shipper may still be entitled to damages if, in the case of the long-and-short-haul clause the higher rate for the shorter distance, or in the case of the aggregate-of-intermediates clause the higher through rate, is unreasonable under section 1, or discriminatory or unduly prejudicial under sections 2 and 3.

In both instances the Director General concedes that the higher rate for the shorter distance, on the one hand, or for the through rate on the other, is prima facie unreasonable; in the one instance because higher than the rate from or to (as the case may be) the more distant point, and in the other because higher than the aggregate of the intermediates. While, however, he concedes that both rates are prima facie unreasonable, he submits that the unreasonableness of both is prima facie only, and may be rebutted; as to the long-and-short-haul clause by showing the rate to the point beyond depressed below a maximum reasonable basis by water or other competition, and the rate to

the intermediate point fairly comparable with other rates for similar services under similar conditions; as to the aggregate-of-intermediates clause by showing that the intermediate rates are likewise depressed below a reasonable maximum basis, and that the through rate is fairly comparable with other rates for similar services and distances under similar conditions.

Again the Director General concedes that, even if the carrier sustains the burden of showing the rate for the shorter distance, in the case of the long-and-short-haul clause, or the through rate, in the case of the aggregate-of-intermediates clause, reasonable, both rates may still result in discrimination or prejudice under sections 2 or 3, and the carrier may be liable for damages if the shipper so shows, and in addition, proves actual damage as required by the decision of this Court in the case of *Pennsylvania Railroad Co.* v. *International Coal Co.*, 230 U. S. 184, in connection with violations of sections 2 and 3.

If the foregoing be a correct construction of the fourth section, the plaintiff in these cases can not recover for the following reasons:

While these cases involve the long-and-short-haul clause of the fourth section alone, there is still no proof of any violation of the fourth section, since there is neither any proof, nor any attempt to prove, the actual charging and receiving of the lower rate concededly published to the more distant point. Moreover, on this record no question can arise of any possible violation of the first, second, or third sections, or

any possible right of damages under those sections, since the sole claim here is of violation of the fourth section, and of overcharge contended to result therefrom. Indeed, whatever the jurisdiction of the court may have been to entertain this suit for alleged violation of the fourth section,[4] there can be no question that the court would have been absolutely without jurisdiction to entertain a suit for damages because of alleged unreasonable rates under the first section, or discriminatory or unduly prejudicial rates under the second and third sections, without a precedent determination by the Interstate Commerce Commission of the questions of unreasonableness, of discrimination, or of undue prejudice. *Texas & Pacific Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 426; and *Robinson* v. *Baltimore and Ohio R. R. Co.*, 222 U. S. 506.

There, therefore, can be upon this record no burden upon the petitioner (hereinafter called the defendant) to rebut what might otherwise be contended, that the rate from Benchland for the shorter distance was prima facie unreasonable because of the lower rate for the longer distance from Billings.

Likewise, therefore, there can arise no question as to whether discrimination or undue prejudice existed by reason of the higher rate from Benchland, or whether any actual damage may have resulted from such discrimination or undue prejudice, since both

[4] For the purposes of this supplemental brief the jurisdiction of the court to entertain a suit for damages for violation of the fourth section has been assumed. The court should note, however, that the petitioner attacks the jurisdiction of the court in this respect.

questions would clearly have been beyond the jurisdiction of the court in the first instance.

Since, therefore, under the construction of the fourth section contended for by the Director General no recovery can be had by the plaintiff in this case, it becomes pertinent to inquire as to the validity of that construction.

I.

The rate actually published must be collected, even though it violates the fourth section.

It has already been noted that it is the plaintiff's theory, as well as the theory of the lower courts, that the higher rate actually published from Benchland, because of the provisions of the long-and-short-haul clause of the fourth section, became illegal to the extent that it must be read out of the tariffs, and in like manner that the lower rate from Billings, though not actually published in the tariffs to apply from Benchland, must, in effect, be treated as actually published from that point, and to be the only legally published rate from Benchland, and therefore the only rate which the carrier could legally collect under the provisions of section 6 of the Act to Regulate Commerce.

Before referring to the decisions of this Court and of the Commission which demonstrate the fallacy of any such theory, it is desired to point out that the theory itself involves two assumptions which upon analysis it will be readily seen are without foundation.

In the first place, the theory involves the assumption that the long-and-short-haul clause of the fourth section forbids, and is violated by, the *publication* of a higher rate for a shorter than for a longer distance. As has already been noted, and will subsequently be further developed, the long-and-short-haul clause does not forbid, and is not violated by the mere *publication* of a rate, but forbids, and is violated only by the *actual charging* or *receiving of any greater compensation* for a shorter than for a longer distance.

In the second place, the theory involves a *non sequitur*. Even could any possible construction of the prohibition of the long-and-short-haul clause require the higher rate actually published from Benchland to Minneapolis and Duluth to be read out of the tariffs, there is not provision whatever of the long-and-short-haul clause, or of any other portion of the fourth section, which will warrant *reading into the tariffs* the lower rate published solely from Billings to Minneapolis and Duluth, so as to treat it as if actually published from Benchland to Minneapolis and Duluth. On the contrary, the further provision of the fourth section—

> * * * but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance,

expressly negatives any authority to charge for the shorter distance the lower rate actually published for the longer distance.

Even assuming, however, that the mere publication of a higher rate for a shorter distance is unlawful under the long-and-short-haul clause of the fourth section, there is no more warrant on that account for reading such a rate out of a tariff than there would be for reading out of a tariff a rate unlawful under section 1 because unreasonable, or unlawful under section 2 because discriminatory, or unlawful under section 3 because unduly prejudicial, yet it can not be gainsaid that this Court has expressly and consistently held that the published rates, even though unlawful under sections 1, 2, or 3, are nevertheless required by section 6 to be charged and retained, and that such published rates are the only rates which may be legally charged until changed as provided by law.

In this connection it is only necessary to refer to the decision of this Court in the case of *Pennsylvania Railroad Co.* v. *International Coal Mining Co.*, 230 U. S. 184. This Court said (p. 197):

> The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, sec. 2; March 2, 1889, 25 Stat. 855, c. 382, sec. 6. *Armour Co.* v. *United States*, 209 U. S. 56, 83.) The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute

> binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.
>
> In view of this imperative obligation to charge, collect, and retain in the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid.

While it is true that the specific question before this Court in the *International Coal* case was discrimination under section 2, it will be noted that the language used by the Court expressly includes unreasonableness under section 1. Indeed, the assumption is warranted that neither the plaintiff nor either of the lower courts would question this proposition as applied to section 1, 2, or 3. Yet there is no difference in the degree of unlawfulness declared in those sections from the degree of unlawfulness declared by section 4, and it would be reasonable to assume therefore no difference between the several sections in the degree of the obligation to charge and retain the actually published rate.

The only possible difference which can be suggested between sections 1, 2, and 3 on the one hand, and section 4 on the other, is that in order to determine whether a rate is unreasonable, discriminatory, or unduly prejudicial under the first, second, and third sections, respectively, the exercise of the administrative judgment of the Commission must be called upon to determine the degree of unreasonableness, or of discrimination, or of undue prejudice, while under the long-and-short-haul clause of the fourth section the contention might be, and presumably is made by the plaintiff, that the degree of unlawfulness is fixed by the fourth section itself. Not only, however, does any attempt to distinguish the fourth section on this ground involve the fallacious assumptions just pointed out, that is, that the long-and-short-haul clause is violated by the mere publication of a higher rate for a shorter distance, and that such higher rate must not only be read out of the tariffs, but that the lower rate for the longer distance must be read in, but it involves the fundamental error of attempting to construe the fourth section as if that section stood alone. In order to read the higher rate actually published from Benchland to Minneapolis and Duluth out of the tariffs, and to permit the carriers to charge between those points the lower rate actually published only from Billings to Minneapolis and Duluth, it is necessary to ignore not only the prohibition of section 6 that—

> Nor shall any carrier charge * * * a * * * *less* or different *compensation* for

> such transportation of * * * property * * * between the points named in such tariffs *than the rates*, fares, and charges *which are specified in the tariffs* filed and in effect at the time,

and to ignore the further prohibition that—

> Nor shall any carrier * * * remit in any manner or by any device any portion of the rates, fares, and charges so *specified*,

but since any possible implication of authority to charge for the shorter distance the lower rate actually published only for the longer distance is, as has been seen, expressly negatived by the provision of section 4 itself that—

> But this shall not be construed as authorizing any common carrier * * * to charge or receive as great compensation for a shorter as for a longer distance,

the result is to require a violation of the further provision of section 6 that—

> No carrier * * * shall engage * * * in the transportation of * * * property * * * unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act.

A conclusive answer, however, to the plaintiff's contention that the long-and-short-haul clause of the fourth section required the carrier to disregard the higher rate actually published from Benchland, and to charge only the lower rate actually published from Billings, is afforded if the Director General be

correct in his position that the fourth section does not forbid, and is not violated by, the mere publication of a higher rate for the shorter distance, but is violated only by the actual charging or receiving of greater compensation for the shorter than for the longer distance. If the Director General is correct in this position, and he will subsequently undertake to sustain it more fully, it follows that the only rate the carrier can charge is the higher rate actually published for the shorter distance, since there is no practicable way by which either the carrier or the shipper could know at the time collection is made whether there has been an actual shipment for the longer distance for which a lower rate has actually been collected. In other words, since even the plaintiff would presumably concede that the published rate must be observed, at least unless the fourth section is violated, there would have been no way in this very case by which either the carrier or the plaintiff itself could have told whether the fourth section was violated, and therefore whether the published rate from Benchland could be ignored, since so far as this record goes there is nothing to show that there had been any actual movement from Billings to Minneapolis and Duluth and, therefore, any actual charging of the lower rate for such movement.

Moreover, in this connection it must not be overlooked that while rule 77 of the Commission's tariff circular 18–A requires that orders granting fourth section relief be shown upon the face of the tariffs, the Commission does not require that applications

for fourth section relief appear upon the tariffs. Therefore, since under the second proviso of the fourth section such applications, until passed upon, afford temporary relief, a shipper could never know whether the published rate was to be observed or not, for even on the plaintiff's theory the published rate could only be ignored if in violation of the fourth section, which it would not be if an application for relief had been filed, and this the shipper would have no way of determining without investigating the Commission's files in Washington.

Before the Director General, however, undertakes to set out more fully the basis for his position that the fourth section is not violated by the mere publication of a higher rate for a shorter distance, it is desired to discuss briefly, first, two decisions of this court, one that in *United States* v. *Louisville & Nashville Railroad*, 235 U. S. 322, and the other in *Boston & Maine Railroad* v. *Piper*, 246 U. S. 439, and then to refer, briefly, to the repeated rulings of the Interstate Commerce Commission which have consistently recognized the imperative obligation resting upon the carrier to collect the published rate, even though it violates the fourth section.

The following language from the case of *United States* v. *Louisville & Nashville R. R.*, *supra*, is sometimes quoted in support of the theory which plaintiff advances here:

> The right to continue it (that is, the greater charge for the shorter distance) had been expressly prohibited by statute until on applica-

> tion made to the Commission its consent to that end was given. (Page 322.)
>
> * * * * *
>
> And for the purpose of making the provision efficacious it was enacted that after a time fixed *no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted. Int. Mountain Rate Cases*, 234 U. S. 476. If, then, it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form and looking at the substance of things, was when originally established an exertion of the authority conferred or recognized by Section 4 of the Act, as there is no pretense that permission for its continuance had been applied for, as required by the amendment, and the statutory period for which it could be lawfully continued without such permission had expired, *it follows that its continued operation was manifestly unlawful and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below.* (Page 323.) (Italics added.)

The context in which this language was used, however, must not be overlooked. The Court was not passing on the question as to whether the higher rate was the legally applicable rate, but on the question of the Commission's power to forbid the continuance of that rate for the future. Indeed, the last portion of the quotation which is italicized above clearly implies the Court's recognition of the

fact that although the published rates were unlawful they continued in actual force.

In fact, it can only be said that this latter language of the Court but serves to make clear what can only be termed, with all due respect, the looseness of this Court's prior language, even when its context is considered.

With all due deference to the late Chief Justice, it *was not*—

> enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted.

It was merely enacted that such rates *should be unlawful* for the future unless authorized by the Commission upon application. Such rates, however, were not declared any more unlawful than were unreasonable rates under section 1, or discriminatory or prejudicial rates under sections 2 and 3, and, as has been seen, this Court has uniformly held rates unlawful under any or all of the first three sections, nevertheless, to continue in force until changed as provided by law. Indeed not the least remarkable aspect of what has come to be known as the Nashville Case, is the fact that no one has since been able to determine just how the late Chief Justice worked out a fourth section violation in that case. No question of fourth section violation was raised by either counsel for the Government or counsel for the carrier, and after the decision the Interstate Commerce Commission, it is to be noted, based its subsequent order on section 3 and not on

section 4. See *Duncan* v. *N. C. & St. L. Ry.*, 35 I. C. C. 477. However this may be, the Director General does not apprehend that this court will seek to extend to the determination of the question of what was the legally applicable rate for the past, language used by this Court with reference to the Commission's power for the future, and which was, even in that connection, of questionable accuracy.

On the other hand, the *Piper case* might be claimed to lend some color to the plaintiff's contention that, assuming the rate charged from Benchland to Minneapolis and Duluth violated the fourth section, it thereby became unlawful to such an extent that it must be read out of the tariff. That case was a suit for damages for delay to a shipment of livestock, and this Court held that a provision in the livestock bill of lading limiting liability for delay caused by the carrier's negligence to the additional cost to the shipper for food and water during the delay, was not binding upon the shipper, although the form of the bill of lading was published in the tariffs of the carrier filed with the Interstate Commerce Commission. The Court said (p. 445):

> In the bill of lading, now under consideration, there is an express agreement limiting liability from unusual delay and detention, caused by the carrier's negligence, to the amount actually expended by the shipper in the purchase of food and water for his stock while so detained. This stipulation contravenes the principle that the carrier may not exonerate itself from losses negligently caused

> by it, and is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate. Such stipulations as are here involved are not legal limitations upon the amount of recovery, but are in effect attempts to limit the carrier's liability for negligence by a contract which leaves practically no recovery for damages resulting from such negligence. *While this provision was in the bill of lading, the form of which was filed with the Railroad Company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact.* The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed with that body (*Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 654); but not so of conditions and limitations which are, as is this one, illegal, and consequently void.

It might be contended that the portion of the Court's opinion which has been italicized, if carried to its logical conclusion, would warrant the holding that any provision of a tariff which is unlawful or illegal because in contravention of some statute or decision may be disregarded. It must be remembered, however, that the question upon which this Court was passing was not whether the lower rate to which the invalid condition attached remained, nevertheless, applicable to the shipment, but whether in a suit for damages for delay the invalid condition itself could limit the carrier's liability for delay, whatever rate was legally applicable. There is

nothing in this Court's opinion in the *Piper case* which would indicate what would have been its decision had it been called upon to say whether the lower rate to which the invalid condition attached remained, nevertheless, applicable or whether the higher rate provided by the tariffs in the absence of such condition became the applicable rate. Moreover, whatever the decision of this Court might have been even in such a case, it is clear that it could have no application here, for, as has already been pointed out, the Court here could not read out of the tariff the rate actually published from Benchland to Minneapolis and Duluth and read into the tariff the rate actually published only from Billings to those destinations without violating not only the mandatory provisions of section 6 of the Act, but the express provisions of section 4 itself.

It is submitted, therefore, that this court should not hesitate to extend specifically to the fourth section the doctrine of the *International Coal case*, consistently applied by this court to the first, second, and third sections; that is, that the actually published rate must under all circumstances be collected and retained, even though that rate be unlawful under some other section of the Act, leaving the shipper, however, the right, if otherwise unlawful, to obtain damages under section 8 or section 16.

Furthermore, it should be persuasive to the court that the Interstate Commerce Commission itself has consistently held that under section 6 of the Act the actually published rate must be collected, not

only where the actually published rate violates sections 1, 2, and 3, but even where it violates section 4.

In its Conference Rulings the Commission has invariably held that the published rate must be collected, even where it violates section 4. It is true that the violations upon which the Commission has specifically passed have been violations of the aggregate-of-intermediate clause, but its rulings are the stronger for that reason, since, as has been seen, that clause, unlike the long-and-short-haul clause, may be violated by the charging of the higher through rate whether or not the aggregate-of-intermediate rates is ever actually collected.

In Conference Ruling 220–G the Commission said:

> The Commission has repeatedly announced the view that the law does not permit the use of any rate or fare except that contained in a lawful tariff that is applicable via the line, route, and gateway over and through which the shipment or passenger moves. The lawful rate or fare for through movement is the through rate or fare, wherever such through rate or fare exists, even though some combination makes a lower rate or fare and even though the practice in the past has been to give to some the benefit of such lower combination. * * *

While this Conference Ruling was issued in 1907, and therefore before the amendment to section 4, which made unlawful a through rate greater than the aggregate of applicable intermediates, the Commission has reaffirmed its ruling as applicable to the

amended fourth section. In 1913 the Commission issued Conference Ruling 443, reading as follows (and, it will be noted, specifically referring to Ruling 220–G):

> Upon inquiry as to whether a through distance tariff rate should be applied in cases where a combination rate, made up of a rate to an intermediate point and a distance tariff rate beyond, makes a lower through charge: *Held*, That the through rate is the only lawful rate. (See Ruling 220–G).

Both of these rulings may be found in volume 45 of the Commission's reports.

In its formal decisions, on the other hand, the Commission has repeatedly recognized that the published rate must be collected, not merely where it violates the aggregate-of-intermediate clause of the fourth section, but also where it violates the long-and-short haul clause.

Pierpont Mfg. Co. v. *Southern Ry. Co.*, 50 I. C. C. 81.

Oregon Fruit Co. v. *S. P. Ry. Co.*, 50 I. C. C. 719.

Iten Biscuit Co. v. *C., B. & Q. Ry. Co.*, 50 I. C. C. 724; 53 I. C. C. 729.

Illinois Brick Co. v. *Director General*, 57 I. C. C. 320 (p. 322).

Union Tanning Co. v. *Director General*, 57 I. C. C. 357.

Empire Refining Co. v. *Director General* 58 I. C. C. 713.

Chittenton & Eastman Co. v. *Director General*, 68 I. C. C. 267.

> the act; and even should it appear that this proportional rate was established for improper purposes, it is nevertheless the legal standard of charges for the shipping public until withdrawn under condemnation by the Commission or by voluntary action of the carriers. The point is that regardless of the nature or motive, whether lawful or unlawful, of the negotiations, of whatever character, preceding its establishment, a rate is not affected in its character as the standard rule of action and public rate under section 6 so long as it remains in effect in the manner prescribed in the act and by our tariff regulations. In a proper proceeding its unlawfulness under other sections and the injustice resulting from its enforcement may be corrected by suitable order at the time the Commission is called upon to pass upon its reasonableness and justness.
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> * * * * *
>
> *This application of the statute to these facts is not a technical one, but is imperative, not only because in conformity with the strict letter of the law, but with the only construction which will preserve the chief function of section 6,* which, as declared by the Supreme Court, is to accord and require the application of the same rate to all shippers and to promote equality of treatment between them.

While again it is true that, like this court in the *International Coal case*, the Commission did not have before it in the *Crescent Coal & Mining case* any question of the violation of section 4, it is clear, for the reasons already given in connection with the de-

cision of this court in the *International Coal case*, that the same principles must be applied to section 4 in this respect as to the other sections of the Act, and that the chief function of section 6 of the Act can not be preserved unless it be required that the published rate be collected not only where it violates sections 1, 2, and 3, but as well, where it violates section 4.

Of interest in this connection are the decisions of the Interstate Commerce Commission in *Nashville Traffic Bureau* v. *L. & N. R. R. Co.*, 53 I. C. C. 37, and of the St. Louis Court of Appeals of Missouri in *Mobile & Ohio R. R. Co.* v. *Southern Saw Mill Co.*, 251 S. W. 434, in the first of which the Commission, and in the second of which a court both recognized as the legal rate, a rate published in direct contravention of a specific order of the Commission itself.

Before concluding this consideration of the question of the obligation to collect the published rate under all circumstances, it is desired to point out to the court that such an obligation, so far as the long-and-short-haul clause of the fourth section is concerned, is not necessarily inconsistent with the jurisdiction of a court to award damages for violation of that section without preliminary recourse to the Interstate Commerce Commission. It has already been noted that in this brief the question of the relative jurisdictions of the court and of the Commission in this respect will not be discussed. (See footnote, p. 10.) It will suffice to say here that the right of a court to award damages for

violation of the long-and-short-haul clause of the fourth section might be recognized consistently with a due regard for the absolute obligation to collect the published rate imposed by the sixth section, and consistently with a recognition that a court could have no such jurisdiction with reference to the first, second, and third sections. Due regard for the mandate of the sixth section that the published rate be collected and retained would be accorded since the shipper would be required in the first instance to pay that rate, and could only recover damages if he should prove to the court that the fourth section was violated by the actual collection of a lower rate to the more distant point. On the other hand, this would not be inconsistent with the requirement of preliminary resort to the Commission in connection with sections 1, 2, and 3, since, as has been noted, there is no necessity in the case of the fourth section for administrative determination by the Commission of the degree of unlawfulness, as that is fixed by the fourth section itself, while such administrative determination is necessary to determine the degree of unreasonableness under the first section, or of discrimination or undue prejudice, under the second and third sections. In short, the jurisdiction of a court to grant damages for violation of the long-and-short-haul clause of the fourth section does not necessarily involve any departure from the published rate, or any treatment of such violation as a straight overcharge.

II.

The long-and-short-haul clause of the fourth section is not violated by the mere publication of a higher rate for a shorter than for a longer distance, but only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance. In this respect it is fundamentally distinguishable from the aggregate-of-intermediates clause, which latter clause, while not violated by the mere publication of a through rate higher than the aggregate of intermediates, is violated by the charging of the higher through rate, even though the aggregate of intermediates is never actually charged.

If the Court will refer to the fourth section as printed in the appendix, the court will immediately note the difference in the language of the long-and-short-haul clause and of the aggregate-of-intermediates clause in this respect.

The long-and-short-haul clause provides that—

> It shall be unlawful for any common carrier * * * to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

On the other hand, the Court will note that the aggregate-of-intermediates clause reads that—

> It shall be unlawful for any common carrier * * * to charge any greater compensation as a through rate than the aggregate-

of-intermediate rates subject to the provisions of this act.

It is apparent at once that under the long-and-short-haul clause no greater compensation can be charged or received for a shorter than for a longer distance, unless some compensation is charged for the longer distance. Furthermore, that there can be no transportation of a like kind of property for a shorter than for a longer distance, unless the same kind of property is transported for the longer distance. It is particularly to be noted that the prohibition of the long-and-short-haul clause only applies "over the same line or route." In other words, there is no prohibition against the collection of greater compensation for a shorter than for a longer distance, if the property does not move over the same line or route between the two points. It is a matter of common knowledge that frequently there are two or more routes between given points, and that rates are often published without any routing restrictions whatever. Therefore, so far as the tariffs themselves are concerned, it would be entirely possible for the same kind of property to move to the more distant point without ever moving through the intermediate point, and therefore without violation of the long-and-short-haul clause, since the movement would not have been "over the same line or route." In other words, it can not be determined whether there has been a violation of the long-and-short-haul clause until there has been actual movement through the intermediate point to the more distant point.

On the contrary, while under the aggregate-of-intermediates clause, as under the long-and-short-haul clause the mere publication of a through rate higher than the aggregate of intermediate rates is not unlawful, unlike the long-and-short-haul clause it is unlawful to charge a through rate higher "than the aggregate of intermediate rates subject to the provisions of this act," whether or not the aggregate of intermediate rates are themselves ever charged, or whether a like kind of property is ever transported under them.

This distinction, moreover, is not without its reasons. Reference to the Congressional Debates in connection with the amendment of the fourth section in 1910 will show what Congress had in mind in enacting those amendments. It will suffice to say here that the aggregate-of-intermediates clause was designed principally to obviate those situations where a shipper could, by billing to an intermediate point and by taking constructive possession of a shipment and rebilling it to its ultimate destination, get a lower combination of rates than applied as a through rate from point of origin to ultimate destination.[5] Such situations arose generally, though

[5] In this connection see pages 4579 to 4580 and page 4582, Congressional Record, April 12, 1910; pages 4995 to 4986, April 19, 1910; page 5733, May 3, 1910; page 6019, May 12, 1910.

It is to be noted that Chairman Mann of the Interstate Commerce Committee of the House was himself in error as to just what situation the aggregate-of-intermediates clause was intended to meet, apparently believing it involved some element of misrouting.

See also report on hearings before the House Committee on Interstate Commerce, Sixty-first Congress, second session, pages 5 to 6, January 18, 1910; and Report to the House on H. R. 17526, Report No. 923, pages 8 to 9, Sixty-first Congress, second session.

not always, because the combination of an interstate rate with a lower state rate made a lower aggregate than the through interstate rate. Sometimes such combinations, however, did not contain a state factor, but resulted from one of the intermediate rates being depressed by water or other competition at the intermediate point. Curiously enough, moreover, Congress eliminated the state and interstate combinations from the purview of the fourth section by the provision that the aggregate of intermediate rates should be that "subject to the provisions of this act." What Congress did mean to accomplish, however, was to relieve the shipper from the necessity and inconvenience of having to take actual or constructive possession of his shipment at the intermediate point and of then having to rebill it, and to give the shipper the benefit of the combination of intermediates on the through movement, while at the same time relieving the carrier of the actual additional expense incident to the double terminal service necessarily involved in the reshipment. The very thing, therefore, that Congress sought to eliminate by the aggregate-of-intermediates clause was the necessity of any movement under the intermediate rates by giving the shipper, so far as consistent with section 6 of the Act, the benefit of the aggregate-of-intermediate rates instead of the higher through rate. In this connection the Director General will subsequently undertake to show that the construction for which he contends as to damages under the aggregate-of-intermediates clause accomplishes this purpose of

Congress, while it at the same time gives full effect to the requirement of section 6 of the act that the published through rate be collected.

On the other hand, no such situation arose in connection with the long-and-short-haul clause. The shipper for the shorter distance could, of course, accomplish nothing by moving his shipment through the more distant point, since he would then have to pay an additional charge to get the shipment back to the intermediate point where he really wanted it, and in the aggregate, therefore, would finally pay more than, or at least as much as, the original intermediate rate. The injury to him arose only if another shipper did actually ship the same kind of property for a greater distance through the very point to which he shipped, at a lower compensation, and he was not interested in the slightest if a lower rate merely existed to the more distant point without being actually used, since there was no way in which he himself could use it.

It is unfortunate, however, that the Interstate Commerce Commission, in considering both the long-and-short-haul clause and the aggregate-of-intermediates clause of the fourth section, has failed to distinguish between what constitutes violation and what constitutes damage under those respective clauses.

So far as the long-and-short-haul clause is concerned, this is well illustrated by the Commission's decisions in the cases of *Oregon Fruit Co.* v. *Southern Pacific Co.*, 50 I. C. C. 719, and *Iten Biscuit Co.* v. *C., B. & Q. R. R. Co.*, 50 I. C. C. 724; 53 I. C. C. 729. In both these cases the Commission's reports show

that there was a failure to prove any movement from the more distant point. Nevertheless, the Commission, instead of dismissing the complaints for failure to prove any violation of the fourth section, treated them as constituting violations of that section, but dismissed them on the ground of fai ure to prove damage because of failure to prove movement from the more distant point. The majority and dissenting reports in both cases readily disclose the inconsistencies to which both the majority and the minority were driven, the majority in trying to defend a correct result arrived at by wrong reasoning, and the minority in attacking the result, instead of attacking the erroneous reasoning by which the correct result was reached.

Again, in the case of *Anaconda Copper Mining Co.* v. *Director General*, 64 I. C. C. 136, the Commission fails to make clear whether it treats a similar situation as constituting a failure to prove a violation of the long-and-short-haul clause, or a failure to prove damages, or both, and again the majority opinion of the Commission and the dissenting opinion of Commissioner Campbell, show the continued confusion resulting from the Commission's persistent failure to define the grounds upon which it proceeds.

These decisions will not be further analyzed at this time, as it will be necessary to consider them in some detail in connection with the discussion of what constitutes damage in connection with actual violations of the fourth section, as distinguished from what constitutes damage in cases of protected departures. It will suffice to say here that much of what is said in

the dissenting opinions in all three cases would be justified if the cases actually involved violations of the long-and-short-haul clause, and that likewise it would be impossible to sustain the action of a majority of the Commission in dismissing the complaints had violations been actually proved.

III.

What constitutes damage in connection with actual violations of the fourth section as distinguished from what constitutes damage in connection with protected departures therefrom; also as distinguished from what constitutes damage where, as here, there is no actual violation of the long-and-short-haul clause because the lower rate was not actually collected for the longer distance.

It has already been noted that under the first proviso of the fourth section the Commission has power to relieve the carriers from the operation of that section[6] and that where such relief is granted

[6] Certain doubts as to whether this power extends to relief from the aggregate-of-intermediates clause or is confined to the long-and-short-haul clause have frequently been expressed.

Chairman Mann, of the Interstate Commerce Committee of the House, expressly stated during the debates upon this proviso in 1910, "While we have provided that the railroads can not charge less for the longer distance than for a shorter distance, or a less aggregate than the local rates, still it did not mean to make it so absolute that it might not be departed from. We have given the Interstate Commerce Commission, as it was given in the original law, power, upon petition in special cases, after investigation to authorize a company to charge less for the long haul than they do for the short haul." (Pp. 4579, 4580, Congressional Record, April 12, 1910.)

It will be noted that the first sentence above quoted applied to both clauses of the fourth section, while the second sentence refers specifically only to the long-and-short-haul clause. Chairman Mann, however, throughout the debates had a tendency to inapt statement.

On the other hand the annual report of the Interstate Commerce Commission for 1911, pages 19 and 20, shows that the Commission assumed that its power extended to both clauses, and it has in fact freely considered applications as to both clauses, though relief has seldom, if ever, been granted as to the long-and-short-haul clause.

a higher rate may be charged for a shorter distance or a higher through rate may be charged than the aggregate of intermediates, without violation of the fourth section. It, moreover, has been seen that, even where no relief has been granted by the Commission from the operation of the long-and-short-haul clause of the fourth section, that clause is not violated by the mere publishing and charging of a higher rate for a shorter distance than is published for a longer distance, but is only violated if the lower rate for the longer distance is actually charged and received. It has further been noted, however, that even where a departure from the fourth section is protected, the charging of the higher rate for the shorter distance, or of a higher through rate than the aggregate of intermediates, may nevertheless result in a violation of section 1, because such higher rates are unreasonable, or in a violation of section 2 or 3, because they result in discrimination under section 2 or in undue prejudice under section 3. Likewise, it has been suggested that, even where there is no actual departure from the long-and-short-haul clause of the fourth section, because the lower rate for the longer distance was not actually charged, the higher rate may be similarly unreasonable under section 1, though there can be neither a violation of section 4 nor actual discrimination nor undue prejudice under section 2 or 3, since the lower rate for the longer distance was not actually charged.

Not only, however, has the Commission persistently confused the question of what constitutes a violation

of these respective clauses of the fourth section with what constitutes damage resulting from a violation of those clauses, but it has even more hopelessly confused what constitutes damage incident to actual violation with what constitutes damage incident to protected departures, and, in addition, so far as the long-and-short-haul clause is concerned, with what constitutes damage where there is no actual violation of the fourth section, because the lower rate was not actually collected for the longer distance. The Commission apparently fails to appreciate that the damages resulting from an actual violation of either clause of the fourth section are essentially different from, and are to be differently determined than, the damages arising in the absence of a violation of the fourth section, under other sections of the act, though all may arise from the charging of a higher rate for the shorter distance, or of a higher rate than the aggregate of intermediates.

The record in this case fails to show any actual violation of the fourth section, because there is no proof, nor was there any attempt to prove, that the lower rate, though published from Billings, was ever actually charged and received. As there was no actual departure from the long-and-short-haul clause, there was no necessity for relief, and hence it is immaterial whether or not the application (tr. p. 15) covered this situation.

A consideration both of the nature of the damages recoverable for an actual violation of the fourth section and of the nature of

damages which still might result to a shipper even in the absence of a fourth section violation will serve to disclose that a shipper still has protection against damages resulting to him from the charging of a higher rate for a shorter distance or a higher through rate than the aggregate of intermediates, if such higher rates are either unreasonable, in violation of section 1, or unjustly discriminatory or unduly prejudicial, in violation of sections 2 and 3.

Consideration will therefore be given, first, to the nature of the damage resulting from actual violations of either clause of the fourth section, and, second, to the nature of the damage which may result, under other sections of the act, from the charging of a higher rate for a shorter distance, or of a higher through rate than the aggregate of intermediates, even where such charges did not involve a violation of the fourth section itself.

What constitutes damage in connection with actual violations of the fourth section.

The Commission has in numerous cases considered the question of damage for alleged or supposed violations of both clauses of the fourth section. These cases are too numerous to permit of detailed discussion within the limits of this brief, but for the convenience of the court the more important ones are cited in the footnote.[7] There are, however, certain

[7] Aggregate-of-Intermediates cases: *Michigan Buggy Co.* v. *G. R. & I. Ry. Co.*, 15 I. C. C. 297; *Lindsay Bros.* v. *B. & O. S. W. R. R. Co.*, 16 I. C. C. 6; *White Bros.* v. *A. T. & S. F. Ry. Co.*, 17 I. C. C. 288; *Windsor Turned Goods Co.* v. *C. & O. Ry. Co.*, 18 I. C. C. 162; *Goodwin* v. *Y. & M. V. R. R. Co.*, 31 I. C. C. 25; *Board of Trade of Kansas City* v. *C. M. & St. P. Ry. Co.*, 34 I. C. C. 208; *Through Rates to Points*

cases which it is necessary to consider, some dealing with the long-and-short-haul clause and others dealing with the aggregate-of-intermediates clause.

Reference has already been made to the fact that in the *Iten Biscuit*, the *Oregon Fruit*, and the *Anaconda Copper* cases the Commission treated those cases, where there was in fact no violation of the long-and-short-haul clause, because no proof that the lower rate for the longer distance had actually been charged, as if that clause had actually been violated, and dismissed those complaints, not as it should have done, because of failure to prove violation, but because of failure to prove damage. Curiously enough, however, the Commission in all those cases, which it erroneously supposed to involve actual violations of the long-and-short-haul clause, undertook expressly to apply the same test as to proof of damage

in La. & Tex., 38 I. C. C. 153; *Slane Glass Co.* v. *V. & S. W. Ry. Co.*, 39 I. C. C. 586; *Joseph Iron Co.* v. *M. L. & T. R. R. & S. S. Co.*, 40 I. C. C. 525; *Lafayette Chamber of Commerce* v. *L. W. R. R. Co.*, 41 I. C. C. 297; *Blackwell Lumber Co.* v. *M. P. Ry. Co.*, 42 I. C. C. 756; *Alabama Packing Co.* v. *L. & N. R. R. Co.*, 47 I. C. C. 524; *Williams Co.* v. *Pennsylvania Co.*, 50 I. C. C. 531; *Rice Potato Co.*, v. *B. & O. R. R. Co.*, 51 I. C. C. 364; *Texas Cottonseed Crushers' Assn.* v. *G. C. & S. F. Ry. Co.*, 53 I. C. C. 627; *Alabama-Georgia Syrup Co.* v. *L. & N. R. R. Co.*, 58 I. C. C. 521; *Hudson Mule Co.* v. *L. & N. R. R. Co.*, 63 I. C. C. 7; *Standard Rail & Steel Co.* v. *M. P. R. R. Co.*, 73 I. C. C. 219; *American Shipbuilding Co.* v. *Director General*, 77 I. C. C. 439; *Virginia-Carolina Chemical Co.* v. *A. C. L. R. R. Co.*, 78 I. C. C. 107; *Libbey Co.* v. *Director General*, 78 I. C. C. 650; *Lycoming Motors Corp.* v. *E. J. & S. R. R. Co.*, 80 I. C. C. 757; *Davison & Namack Fdy. Co.* v. *Pa. R. R. Co.*, 81 I. C. C. 345.

Long-and-Short-Haul cases: *Randolph Lumber Co.* v. *Seaboard Air Line Ry.*, 13 I. C. C. 601, and 14 I. C. C. 338; *Oregon Fruit Co.* v. *S. P. Co.*, 50 I. C. C. 719; *Iten Biscuit Co.* v. *C. B. & Q. R. R. Co.*, 50 I. C. C. 724, and 53 I. C. C. 729; *Johnston* v. *A., T. & S. F. Ry. Co.*, 51 I. C. C. 356; *Anaconda Copper Mining Co.* v. *Director General*, 64 I. C. C. 136.

> reasonableness of the rates from and to the more distant points, the rule of the fourth section is absolute, the collection of higher charges from and to Omaha was unlawful *per se*, and the excessive charges must as a matter of law be refunded.

In other words, the complainant there was contending that the collection of the higher charges for the shorter distance was a straight overcharge in violation of section 6 which, it has already been shown herein, could under no circumstances be the case. Commissioner Hall, recognizing that there was no overcharge, however, assumed that the only alternative to so holding, was to require the same proof of damages as under sections 2 and 3.

This, the Director General submits, is a *non sequitur*.

It does not follow that because *some* proof of damages is necessary under the long-and-short-haul clause of section 4, it must be the *same* proof as required under sections 2 and 3 by this court in the *International Coal* case, supra. Indeed this court itself has recognized a different character of proof of damages to suffice under the first section than under the second and third sections. *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531. The Director General believes that there is far more analogy between the test of damage under the long-and-short-haul clause of the fourth section and the test of damage applied by this court in the *Darnell-Taenzer* case to the first section than to that applied by this court

to the second and third sections in the *International Coal* case. In the *Darnell-Taenzer* case this court held that a presumption of damage resulted from the payment of an unreasonable rate to the extent of the difference between the rate paid and what the Commission might determine to be a reasonable rate, and that this presumption was not rebutted by showing that the freight rate had been passed on to a third party. Without now going into the question as to whether it is possible to rebut the presumption of damage under the first section, the Director General believes that an analogous presumption of damage arises in the case of a violation of the long-and-short-haul clause of the fourth section, to the extent of the difference between the higher rate charged for the shorter distance and the lower rate charged for the longer distance, and that this presumption is not rebutted by showing that the higher rate was itself reasonable or by showing that there was no discrimination or undue prejudice by reason of the charging of the lower rate at the more distant point.

The reasons the Director General believes that a presumption of damage for a violation of the long-and-short-haul clause of the fourth section arises to the extent of the difference between the higher rate paid for the shorter distance and the lower rate actually charged for the longer distance are the following:

(1) It is impossible to read the Congressional debates at the time the fourth section was amended

in 1910 without coming to the conclusion that it was intended, both as to the long-and-short-haul clause and as to the aggregate-of-intermediates clause, to make the higher rates absolutely unlawful except, at most, to the extent that their initial collections as published rates was required by the paramount provisions of section 6. Indeed, it might almost be said that, so far as Congress was concerned, the requirements of section 6 in this respect were little understood, and that doubtless many participating in the debate assumed that it would be unlawful to collect a rate in violation of section 4 even though it was the published rate. However, as has been seen, so to hold would necessarily result in direct conflict with section 6 and in violation of the consistent position of this court that the published rate must under all circumstances be collected. On the one hand, therefore, a construction should, if possible, be arrived at which will give full effect to the intent and purpose of section 4 in this respect, while at the same time observing the paramount provisions of section 6.

(2) To permit the question of damage for a violation of the long-and-short-haul clause of the fourth section to depend upon proof that the higher rate for the shorter distance is unreasonable under section 1, or discriminatory or unduly prejudicial under sections 2 or 3, is to read into that clause as necessary elements of damage the very considerations which Congress intended, and specifically attempted to eliminate as necessary elements of unlawfulness under the fourth section. The specific purpose of section

4, as shown both in the debates in Congress (see Report to the House on H. R. 17526, Report No. 923, pages 8 to 9, 61st Congress, 1st Session) and in the decision of this court in the *Intermountain* case, 234 U. S. 576, was to take away from the carriers the power to initiate such rates, even if the higher rate for the shorter distance might be *per se* reasonable, and even if the apparent discrimination or undue prejudice might be justified, and to make such higher rates conclusively unlawful unless permission for their publication had first been obtained from the Interstate Commerce Commission. Therefore, to hold that a shipper is entitled to damages for actual violation of the long-and-short-haul clause only if the higher rate for the shorter distance is unreasonable *per se*, or is unjustly discriminatory or unduly prejudicial, is to give no effect whatever to the express declaration of the fourth section itself that such rates shall be unlawful, other than what would have obtained under the first, second, or third sections, had the fourth section never been enacted, except, of course, such criminal consequences as might attach to a violation. Criminal prosecutions, however, would only be of vicarious comfort to a shipper who nevertheless had to pay the higher rates. Moreover, it appears to be a conclusive answer to any such construction of the fourth section that, so construed, there is no purpose whatever in a carrier's obtaining relief from the long-and-short-haul provisions of the fourth section except to avoid criminal prosecution, since a carrier would subject itself to no greater

civil liability by actually violating the long-and-short-haul clause than the liability the carrier would be under even if it first obtained relief from the Interstate Commerce Commission. Yet no one familiar with the history of the fourth section and who has read the Congressional debates can doubt that the chief remedy aimed at was a civil remedy, and that it was the intention of Congress to absolutely forbid a carrier to charge the higher rates without first obtaining the permission of the Interstate Commerce Commission, and, so far as consistent with section 6 to give the shipper the benefit of the lower rates in the absence of such permission.

(3) While it has been shown that there is a fundamental distinction between what constitutes violation under the long-and-short-haul clause and what constitutes violation under the aggregate-of-intermediates clause, it is submitted that there can be no difference in the measure of damage once violation is established. The charging of the higher rate for the shorter distance and of the higher through rate than the aggregate of intermediates are equally declared unlawful. The question, therefore, is what damage follows to the shipper from the unlawful act in either case. This can be tested in both cases, as in every case of damage under the act, by determining what the shipper's position would have been had the unlawful act not been committed, and this can best be developed by assuming concrete cases.

Taking first an actual violation of the long-and-short-haul clause, assume a situation where the rate

from A to B is $1.00 and the rate from A to C, a more distant point, to which B is intermediate, is 80 cents. It has been shown that there is no violation of the fourth section by the mere publication of these rates, and that no violation occurs merely by charging the $1.00 rate to B unless the 80-cent rate is actually charged to C. While, however, the charging of the 80-cent rate is necessary before a violation can occur, the violation itself does not consist in charging the lower 80-cent rate at C, but, under the express terms of the long-and-short-haul clause, consists in charging the higher $1.00 rate at B. In other words, while there can be no violation until the 80-cent rate is charged, because the $1.00 rate would not be a higher rate unless there were a lower rate to which it could be related, the long-and-short-haul clause does not make the charging of the lower rate the violation, but makes the violation the charging of the higher rate. The question then is, What would have been the position of the shipper had the carrier not charged at B any higher rate than it charged at C? The only possible answer is, since there was no violation until the carrier actually charged the 80-cent rate at C, that once having charged that rate at C, a violation could only have been avoided by charging not greater than an 80-cent rate at B. It is here in particular that the distinction is seen between damages for a violation of sections 2 or 3 and damages for violation of section 4. Under sections 2 and 3, as said by this court in the *International Coal* case, the carrier would have

had the option of avoiding the violation of those sections by charging the $1.00 rate at C as well as at B. Under section 4, on the contrary, not having violated that section until the 80-cent rate was charged at C, the 80-cent rate having been charged at C, the only way in which the violation could then be avoided was by charging no greater than the 80-cent rate at B. Or, to state it another way, under sections 2 or 3 a violation may consist in the charging of the higher rate at B or in the charging of the lower rate at C, and might be avoided by charging the higher rate both at B and C, or by charging the lower rate both at B and C. Under section 4, on the contrary, by the express terms of that section, the violation consists solely in charging the higher rate at B, and once the lower rate is charged at C, the violation can not be avoided except by charging the same rate at B. Here, again, therefore, to make no distinction in the measure of damage incurred by a violation of the specific provisions of the long-and-short-haul clause of section 4, on the one hand, as against the more general provisions of sections 2 and 3 on the other, is to read the long-and-short-haul clause of the fourth section out of the act, since the same damage would have followed had the long-and-short-haul clause of section 4 never been enacted.

(4) Furthermore, there is nothing inconsistent between recognizing what has been previously established; that is, that the lower rate actually published only for the longer distance can not be treated as the legally published rate for the shorter distance, so as

to make the charging of the higher rate actually published for the shorter distance a straight overcharge, and at the same time recognizing that the lower rate becomes the measure of damage in a case of actual violation of the long-and-short-haul clause. The carrier is still bound to charge and collect the legally published higher rate, and the shipper can only obtain the benefit of the lower rate by proving either to the Commission or to a court (assuming that a court may have jurisdiction) that an actual violation has occurred. When this is proved the presumption of damage follows. Until it is proved the shipper must pay, and the carrier must retain, the actually published higher rate.

So far as the aggregate-of-intermediates clause is concerned, it is even clearer that the measure of damage must be the difference between the higher published through rate and the lower published aggregate of intermediates. Not only has it been shown that that clause, unlike the long-and-short-haul clause, is violated even though the lower rates are never actually charged and received, but it has been seen that what Congress specifically aimed at was to give the shipper the benefit of the aggregate-of-intermediate rates without the necessity of rebilling his shipments and without placing upon the carrier the additional expense of such rebilling. Here again, as in the case of the long-and-short-haul clause, the carrier is nevertheless required in the first instance to collect the higher through rate actually published, which must be retained unless the shipper satisfies

a court or the Commission that an actual violation of the aggregate-of-intermediates clause has occurred, because a through rate has been actually collected higher than an existing aggregate of intermediates, and because there has been no relief from the provisions of that clause, nor any application for such relief. Moreover, just as in the case of the long-and-short-haul clause, the measure of the damage cannot be made to depend upon the reasonableness or unreasonableness of the through rate, or on the existence or nonexistence of discrimination, or undue prejudice. For, again, to so hold would not only be to ignore the real intent of Congress, and the specific wording of the aggregate-of-intermediates clause itself, but would be to determine the question of damage by tests applicable in any event under sections 1, 2, or 3 had the aggregate-of-intermediates clause never been enacted, and which Congress intended to eliminate as justification for actual violations of the fourth section.

As in the case of the long-and-short-haul clause, moreover, it will be instructive to apply the test of damage for which the Director General contends to a concrete case. Assume that the through rate from A to C is $1.00, and that there is a local interstate rate from A to B, an intermediate point, of 40 cents, and a local interstate rate from B to C of 40 cents, making the aggregate of intermediates subject to the act 80 cents. The aggregate-of-intermediates clause is violated as soon as the through rate of $1.00 to C is charged, whether or not the 80-cent aggregate of

intermediates is actually charged to anyone else. There being an existing aggregate of intermediates of 80 cents, the only way in which violation of the prohibition against the charging of a higher through rate could have been avoided was by charging a through rate no greater than 80 cents. Therefore had the carrier not violated the aggregate-of-intermediates clause, the shipper would only have had to pay 80 cents, instead of the published through rate of $1.00.

The analogy of these criteria of damage for actual violations of the long-and-short-haul clause and of the aggregate-of-intermediates clause of the fourth section, to the criterion of damage applied by this Court in the *Darnell-Taenzer* case to violations of the first section, has already been suggested. Of course the distinction exists that in the case of a violation of the first section the administrative functions of the Commission must clearly first be resorted to, to determine the measure of unlawfulness, while in the case of a violation of the fourth section the measure of unlawfulness is furnished by that section itself. The real analogy is in the fact that under both the first and fourth sections, once the measure of unlawfulness is determined, a presumption of damage exists to the difference between the unlawful higher rate charged and the lawful lower rate, and in the further analogy in the manner in which that presumption must be overcome, if at all. In the *Darnell-Taenzer* case this court held that where a shipper paid an unreasonable rate there was a presumption of damage to the difference between the unreasonable

rate paid and the rate which the Commission should determine would have been reasonable. That this is necessarily so will appear by considering a concrete case. Assume a shipper is charged a rate of $1.00 from A to B, and the Commission afterward determines that a rate of 80 cents would have been reasonable.

Had the first section not been violated, therefore, the shipper would not have been compelled to pay out the additional 20 cents and might have made 20 cents more profit. In the *Darnell-Taenzer* case, however, the carrier contended that because the shipper at A in selling to the ultimate consumer at B, had added to his f. o. b. price at A the full $1.00 rate which he paid, the consumer, and not the shipper was damaged. This court, in holding that the presumption of damage to the shipper could not thus be rebutted, perhaps unfortunately did not disclose fully the process of reasoning by which this holding may be supported, and the result has been that the reasons underlying the court's conclusion are not generally understood. It must be clear, however, that it would be entirely consistent with the possibilities, and with the shipper's rights, for the shipper, even had the carrier only charged him an 80-cent rate, still to have added in selling to the ultimate consumer at B the full $1.00 in addition to his f. o. b. price at A. In other words, while probably the shipper would not do this, because presumably there would be nothing to suggest the addition of more than the rate actually in effect, still in general there

would be nothing which would make it impossible, and nothing to prove that the shipper could not have obtained the same gross price at B as he actually obtained, even had the freight rate been lower. There are, however, conceivable circumstances in which it will clearly appear that the shipper could not have obtained as great a gross price with the lower freight rate, and it is submitted that the proof of such circumstances rebuts the presumption of damage, which would otherwise obtain, by reason of the payment of the higher freight rate. If it should be proved, for instance, that the shipper at A was forbidden by government regulation or by some other controlling condition, to add to his base price at A more than the actual freight rate to B, it must be obvious that, even had the reasonable 80-cent rate been actually in effect instead of the unreasonable $1.00 rate, the shipper would not have been benefited thereby, since he must have proportionately reduced his selling price at B, and therefore that he was not damaged merely because the $1.00 rate and not the 80-cent rate was actually in effect. Such special conditions did not appear in the *Darnell-Taenzer* case, but curiously enough, it has been assumed in construing this court's decision in that case that had they appeared the presumption of damage by reason of the payment of the unreasonable rate still would not have been rebutted. The obvious fact that such a presumption can be so rebutted is only discussed here because the Director General submits that only by proof of similar cir-

cumstances can a presumption of damage under either clause of section 4 be rebutted.

Before turning to the consideration of the nature of damage which may yet attend protected departures from either clause of section 4 through incidental violations of sections 1, 2, or 3, it is desired to refer to what Commissioner Hall has said in the *Iten Biscuit* case, 53 I. C. C. 729, at page 731, to the effect that—

> Distinction must be made between the carrier's unlawful act which renders it liable to prosecution and the shipper's right to damages for any pecuniary injury thereby.

In other words, Commissioner Hall, in seeking to support his contention that the test of damage for what he erroneously supposed to have been an actual violation of section 4 would still be no different from the test of damage under the *International Coal* case had sections 2 or 3 only been violated, had recourse to the undoubted rule that one who claims damages from a public wrong must prove in addition a private injury. The fallacy, however, of seeking to support on this ground the contention that the same rule of private damage must apply to section 4 as to sections 2 and 3 lies in the assumption, which it has been seen is contrary both to the terms of those sections and to the intent of Congress, that the character of unlawfulness is the same under the fourth section as under the second and third sections. In other words, it must be conceded that neither under the first, second, third, nor the fourth sections

can a shipper recover damages merely because of the public wrong involved, either under the first in charging an unreasonable rate, or under the second in charging an unjustly discriminatory rate, or under the third in charging an unduly prejudicial rate, or under the fourth in charging a higher rate for a shorter distance than for a longer distance, or a higher through rate than the aggregate of intermediates. Under any of those sections the shipper must prove, in addition to the violation of the public law and the public right, that he has suffered a private injury. The character of that injury necessarily, however, varies with any variation in the nature of the public wrong, since the measure of damage to the shipper in every instance is the difference between what he would have paid or what profit he would have realized had the particular public wrong not have been committed. This court has recognized by its decisions in the *Darnell-Taenzer* case and the *International Coal* case, respectively, the difference in the public wrong, and therefore the difference in the private damage, which results from a violation, respectively, of the first section on the one hand and of the second and third sections on the other. Just so this court should recognize, what the Commission has failed to appreciate, that there being an essential difference in the nature of the public wrong under the fourth section from the nature of the public wrong under the first, second, and third sections, so also there must be a difference in the nature of the private damage.

The Director General, therefore, submits that it must be clear that for an actual violation of either the long-and-short-haul clause or of the aggregate-of-intermediates clause of the fourth section the measure of damage for all practical purposes, waving aside the question of special conditions which might possibly rebut the presumption, is, in the case of the long-and-short-haul clause, the difference between the higher published rate actually paid for the shorter distance and the lower rate actually charged at a more distant point, and in the case of the aggregate-of-intermediates clause, the difference between the higher through rate and the lower aggregate of intermediates actually published, whether charged or not. It should be understood, however, that practically inflexible as this rule of damage may appear, it is not a penalty, but is arrived at by the same test as any rule of damage flowing from an unlawful act must be arrived at; that is, what would have been the injured party's position except for the unlawful act.

It is desired to make clear the nature of the damages which still may result to a shipper, even where departures from the fourth section are protected, or where, as to the long-and-short-haul clause, there is no actual violation of that section because the lower rate for the longer distance was not actually charged. This discussion is essential in order to show that the shippers have protection against the charging of a higher rate for a shorter distance, or of a higher through rate than the aggre-

gate of intermediates, if either results in the charging of an unreasonable rate, or in unjust discrimination, or in undue prejudice.

What constitutes damage in connection with protected departures from either clause of the fourth section, or, in the case of the long-and-short-haul clause, where there is no actual violation because the lower rate for the longer distance was not actually charged or received.

No great elaboration of what the Director General has already set out as his position in this respect would seem necessary, as there would seem to be nothing in that position to which the plaintiff is liable to take exception.

On pages 3 to 11 of this brief the Director General has already set out in full, but without argument, his construction of the fourth section with reference to damages, both for actual violations of that section and in connection with authorized departures therefrom, or in the absence of actual violation of the long-and-short-haul clause. That portion relating to damages incident to authorized departures from both clauses of the fourth section, or in the absence of actual violation of the long-and-short-haul clause, appears under (5) on pages 8 to 11. It is unnecessary to repeat here what is there said. Under the preceding heading there has already been a full discussion of the nature of damages under section 1 as determined by this court's decision in the *Darnell-Taenzer* case, and it has been seen that, even in the case of an authorized departure from either clause of the fourth section, or in the case of a lack of actual

violation of the long-and-short-haul clause, because of lack of proof that the lower rate for the longer distance was actually charged, the charging of the higher rate may still be a violation of section 1, against which the shipper is protected by the right to damages provided for a violation of that section.

It has also been seen that, even in the case of a protected departure from the long-and-short-haul clause or from the aggregate-of-intermediates clause, the shipper may still be subjected to unjust discrimination under section 2, or undue prejudice under section 3, and be entitled to damages for such discrimination or undue prejudice, if proof of actual damage can be made as required by this court's decision in the *International Coal* case.

Finally it has been seen that, even where no relief has been granted from the long-and-short-haul clause, and yet that clause has not been violated by the charging of a higher rate for the shorter distance than was published for the longer distance, because the lower rate for the longer distance was not actually collected, the shipper still is protected, if the higher rate is unreasonable in violation of section 1. Of course, no question of damages by way of discrimination or undue prejudice under sections 2 or 3 can arise in such a case, since the lower rate was not actually charged.

What it is desired again to point out, however, is that the Commission by confusing cases of violation of the fourth section with cases of nonviolation has been led from paradox to paradox. This has already

been commented upon in connection with Commissioner Hall's report in the *Iten Biscuit* case, where he treated a case of nonviolation of the long-and-short-haul clause as one of violation, and yet applied the test of damage that would have been correctly applicable to a case of nonviolation, thus rightly dismissing the complaint but for the wrong reason. It is only necessary to point out in this connection the real significance of proof that the lower rate for the longer distance was actually paid in cases of actual violation and in cases of protected departures, respectively. In cases of actual violation, that proof is necessary to establish the violation. In cases of protected departures, that proof is insufficient to establish damage, unless it further be shown that because of the actual payment by a competitor of the lower rate for the longer distance the shipper for the shorter distance was compelled to shrink his price proportionately. *Pennsylvania R. R. Co.* v. *International Coal Co.* supra.

Likewise, the Commission, through failure to note the distinction between cases of actual violation of the aggregate-of-intermediates clause and of protected departures therefrom, has in the *Hudson Mule* case, 63 I. C. C. 6, which was a case of protected departure, brought itself to the paradoxical situation of continuing to term the unreasonableness of a through rate which exceeds the aggregate of intermediates merely *prima facie*, while in effect ignoring the qualification prima facie, by treating the unreasonableness as absolute. In that case the Commission

actually prescribes as reasonable for the future, through rates not only higher than the previous aggregate of intermediates, but higher than the through rates actually charged, and specifically finds that the through rates in the past were not unreasonably high, except as they exceeded the existing aggregate of intermediates, which, substantially as a matter of law, the Commission believes requires them to be held unreasonable.

Indeed, a reading of the Commission's reports can not fail to leave the impression that the Commission's difficulty lies in the apprehension that there must be some more rigid rule of damages for an actual violation of the fourth section than is incident merely to protected departures therefrom, without any exact comprehension of just what that rule should be, and without any appreciation of the distinction between what constitutes violation on the one hand and damage on the other.

In conclusion, therefore, on the question of the proper construction of the long-and-short-haul clause of the fourth section with reference to damage, the Director General respectfully submits that he has established the correctness of the construction as first outlined in this brief, that is—

> (1) That under any and all circumstances the published rate must be collected, whether that rate violates the long-and-short-haul clause because greater than the rate charged and received for a longer distance, or violates the aggregate-of-intermediates clause, because

greater than an existing combination, but that, in either such event, a shipper may make claim for damages under section 8 or 16 of the act. That under no circumstances is the charging and collecting of such published rate an overcharge in violation of section 6, but, on the contrary, is made mandatory by section 6 itself.

(2) That there is a fundamental distinction between what constitutes a violation of the long-and-short-haul clause on the one hand and a violation of the aggregate-of-intermediates clause on the other.

(*a*) That the long-and-short-haul clause is violated only by the actual charging and receiving of a greater compensation for a shorter distance than is actually charged and received for a longer distance, and is not violated by the mere publication of a lower rate as applicable to the longer distance.

(*b*) On the contrary, that the aggregate-of-intermediates clause is violated by the charging of a through rate greater than the published aggregate of intermediate rates, even though such intermediate rates are never actually charged or received.

(3) That while there is thus a distinction as to what constitutes a violation of the respective clauses, once a violation of either is established the measure of damages is substantially the same.

That is, that in the case of the long-and-short-haul clause the shipper is at least presumptively damaged to the extent of the

difference between the higher rate charged and received for the shorter distance and the lower rate actually charged and received for the longer distance, while in the case of the aggregate-of-intermediates clause the shipper is presumptively damaged in the amount of the difference between the higher through rate charged and the lower aggregate of intermediates published. Moreover, that this damage exists in both instances without reference to either the reasonableness or unreasonableness of the higher or the lower rates.

(4) That there is no violation of the fourth section, and therefore no question of damages under that section—

(*a*) Where, as to both the long-and-short-haul clause and the aggregate-of-intermediates clause, the Commission has, under the provisions of the fourth section, relieved the carrier from the operation of that section;

(*b*) Where, as to the long-and-short-haul clause, even though the Commission has not granted relief, there is no proof that the lower rate was actually charged and received from the more distant point.

Assuming that this construction of the fourth section has been established, it has already been shown that under such a construction the plaintiff herein can not recover, since he neither proved nor attempted to prove that any shipments ever moved from Billings upon which the lower rate was charged and received, or, indeed, that the lower rate was ever charged and received on any shipment. Moreover, it has been seen that the complaint herein did not

purport to cover any incidental damages for violations of sections 1, 2, or 3, and that if it had, such claim for damages would concededly have been beyond the jurisdiction of the court without preliminary recourse to the Interstate Commerce Commission.

The Director General, therefore, submits that this court should reverse the judgment of the Supreme Court of Minnesota.

JOHN F. FINERTY,
Assistant General Counsel,
United States Railroad Administration,
Attorney for Director General.

WASHINGTON, D. C., *December, 1923.*

APPENDIX.

The Act to Regulate Commerce, as Amended.

* * * * *

SEC. 4. (As amended June 18, 1910.) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further,* That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reasons of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall

have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

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Supreme Court of the United States.

October Term, 1922.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

McCAULL-DINSMORE COMPANY,
Respondent.

BRIEF OF RESPONDENT RESISTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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BRIEF OF RESPONDENT RESISTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

THIS IS AN ACTION FOR MONEY HAD AND RECEIVED AND NOT AN ACTION FOR DAMAGES, AND HENCE INVOLVES NO CONSTRUCTION OF INTERSTATE COMMERCE ACT.

The shipments here involved moved over the line of the petitioner from Benchland, Mont., to Minneapolis and Duluth, Minn. For this transportation petitioner charged and collected a rate that was two cents higher than the rate on wheat it then had in force and effect over the same line to these places from a point farther away, namely, Billings, Mont. This action is to recover

for said excess as so much money wrongfully collected on the theory that not more than the Billings rate could be legally charged under Sec. 4 of the Interstate Commerce Act which provides that no greater compensation shall be charged for a shorter than for a longer distance over the same line or route in the same direction. The action is thus one at common law for money had and received, which remedy was not taken away from shippers by this act but was expressly preserved by Sec. 22 thereof which provides:

> "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

The gist and limits of the decision of the Minnesota Supreme Court are contained in the following quotation from the opinion:

> "When a carrier undertakes to establish a greater rate or tariff for a certain haul than a statute permits, and such statute also fixes the carrier's published tariff for a longer haul as the maximum for that certain shorter haul, the excess collected over such maximum should be held as an overcharge, recoverable in an ordinary action at law as money had and received for the use of plaintiff. In the determination of such an issue the court has no occasion to pass upon the lawfulness or reasonableness of the rate collected for the statute has determined that. (191 N. W. 42)

The Interstate Commerce Act is involved only to the extent of the following portion of Sec. 4:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of pas-

sengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance * * *."

It is undisputed that the conditions obtaining here bring this case within the above quoted provisions prohibiting a carrier from charging more for a shorter than for a longer haul. Hence the compass of the question here presented is whether, when there is charged a rate for a shorter haul which is higher than the rate that is charged for a longer haul under those conditions, the excess can be collected as an overcharge by virtue of the provision of Sec. 4 that "it shall be unlawful for any common carrier * * * to charge or receive any greater compensation for a shorter than for a longer distance * * *."

This provision is unconditional. The rate that is charged for the shorter distance must not exceed the rate that is charged for the longer distance. It follows that when this provision is violated, the charge for the longer distance must necessarily be less than the charge for the shorter distance. While neither rate, taken by itself, is unlawful, the existence of both makes each unlawful and at least to the extent of their difference. As both rates must be compared to determine the unlawfulness of either and the extent of such unlawfulness, or otherwise a fourth section violation could never be proven, the fact that the Billings rate, a cheaper rate for a longer distance, exists at the same time that the Benchland rate, a higher rate for a shorter distance, exists, and is therefore unlawful, does not militate against a recovery of the differ-

ence between the two rates in this action for money had and received. If the effect of the comparison is to make the unlawfulness of one rate neutralize the unlawfulness of the other, such comparison, which is the sole test for determining when either violates this section and the extent thereof, would make lawful that which is unlawful. The result would be that two wrongs would make a right and a premium would be put upon every fourth section violation.

Sec. 4 establishes a fixed rule of law by which can be determined to what extent a rate is unreasonable. It was in recognition of the fact that it costs no more to haul the same commodity over the same route in the same direction for a shorter than for a longer distance and to stop the common practice of carriers in charging more for a shorter than for a longer distance, that this long and short haul provision was inserted in the law. A rate that is higher for a shorter than for a longer distance is to that extent unreasonable under the fourth section. Sec. 4 imposes a requirement in addition to those of Secs. 1, 2 and 3. If it did not, the Commission, by declaring reasonable, non-discriminatory and nonprejudicial a rate which is higher for a shorter than for a longer distance in violation of Sec. 4, could declare such rate lawful notwithstanding such violation, and this limitation of Sec. 4 would cease to be a limitation. But just as this long and short haul rule is binding upon the courts in the exercise of their judicial powers, it is likewise binding upon the Commission in the exercise of its administrative powers. The Commission cannot make any find-

ing under Secs. 1, 2 or 3 which would make lawful a rate which Sec. 4 makes unlawful. The commission cannot unmake, any more than it can make, the law.

The right of recovery here cannot be affected by any speculation as to whether, upon investigation, the Commission might find the Billings rate, which is used as the basis for figuring this excess, is unreasonable under Sec. 1, or discriminatory under Sec. 2, or prejudicial under Sec. 3. If such speculation could be indulged in, then a carrier would be very much embarrassed in the collection of its freight rates for the shipper could escape payment unless the carrier could show that an investigation had been made by the Commission as to the rate sought to be collected and that in such investigation the Commission had found that such rate did not violate Secs. 1, 2, or 3.

It is true that upon a fourth section violation being called to the attention of the Commission, the Commision might correct it as to future shipments by making an order raising the rate for the longer distance and making it the same as the rate from the intermediate point, but such an order could not be made retroactive. Sec. 6 of the Act expressly provides that a rate cannot be charged for the transportation of a shipment unless it was established prior to the movement of the shipment, but even if the Commission had such power, it would no doubt exercise it by lowering the rate for the shorter distance and making it equal to the rate for the longer distance since the carrier, by establishing the lower rate for the longer distance, has declared that such rate affords reasonable compensation (*Max-*

well v. Wichita Falls, etc. Ry. Co., 20 I. C. C. 197), and it therefore follows that the rate for the shorter distance should be at least not any more as it costs no more to transport commodities for a shorter than for a longer distance over the same route in the same direction.

If this rate had never been paid, petitioner would not contend that its collection could be enforced. This court has held in *U. S. v. Louisville & Nashville R. R. Co.*, 235 U. S. 314, that a carrier can even be enjoined from collecting a rate that violates the fourth section. In the opinion in that case this court said:

> "The right to continue it (a charge prohibited by the long and short haul clause) had been expressly prohibited by statute until, on application made to the Commission, its consent to that end was given."

THERE IS NO DIFFICULTY IN APPLICATION OF LONG AND SHORT HAUL CLAUSE IN ITS NATURAL SENSE.

If in bringing an action of this kind the shipper does not figure the excess sought to be recovered on the basis of the cheapest rate for a longer distance that is found in the tariff of the carrier, manifestly the principle underlying the right of recovery is not thereby affected. If in violation of Sec. 4 there is collected from the shipper a rate for a shorter haul that is higher than rates for longer hauls, then regardless of however numerous such cheaper rates for longer hauls may be, the shipper can recover the difference between the rate paid and any one of the cheaper rates for any of the longer hauls.

Whichever of the cheaper rates is used in the process of subtraction to ascertain the amount of the excess paid, the difference so arrived at, as aptly said by the Minnesota Supreme Court in its opinion in this case, is "that much money wrongfully taken out of his (the shipper's) purse," although a greater difference might have been obtained if a different cheaper rate had been used in the calculation.

If upon getting a recovery the shipper finds a rate for a longer distance that is cheaper than the rate he used as a basis in figuring the amount due, he of course would not be permitted to open up his case and by amending his pleading get a recovery by using as a basis for figuring such excess the rate that he discovered after obtaining his judgment, nor could he use such rate as a basis for getting additional recovery in a new action, any more than a person who obtains a judgment on an account, upon finding an error in such account in favor of the debtor, can open up the case and recover the amount as shown by the account after such error has been corrected, or can maintain another action to recover on the account as corrected. When a litigant has had his day in court and has presented his case, the law owes him no duty to permit him to present his case anew where, by reason of his own negligence, he has not so presented his case as to permit him to recover the maximum amount that the actual facts, if presented, would have entitled him to recover.

Where a higher rate is collected for a shorter than for a longer distance, the statute does not make the right to recover the overcharge dependent upon whether the carrier has an undercharge

claim for transporting a shipment for the longer distance for which the cheaper rate is collected. By the single provision that not more shall be collected for a shorter than for a longer distance the carrier is prohibited from collecting more, but if it does, the difference between the rates so collected does not belong to it and should be paid back.

While we are not concerned with the question of whether a carrier has an undercharge claim in the case supposed by petitioner, it may be observed that by virtue of Sec. 6 of the Act providing that a rate must be established before it can be collected and that no greater rate shall be collected than the rate shown in the tariff, it would logically follow that the carrier cannot charge more for the longer haul than the rate the carrier has published for it. That is consistent with the right of the shipper to recover the overcharge here for, under a familiar rule of statutory construction, the general provision of Sec. 6 that no rate shall be collected other than the published rate must give way to the specific provision of Sec. 4 that no higher rate shall be charged for a shorter than for a longer haul. Where the carrier charges less for a longer than for a shorter haul, the carrier could not even enforce the collection of such cheaper rate inasmuch as such rate is unlawful. The situation thus becomes the same as where the carrier has established no rate and the effect is that, under the express provisions of Sec. 6, the carrier is unlawfully engaged in the transportation of property. (*Maxwell v. Wichita Falls, etc. Ry. Co.*, 20 I. C. C. 197)

THE CASES DECIDED BY THE INTERSTATE COMMERCE COMMISSION, WHICH ARE RELIED UPON BY PETITIONER, ARE DISTINGUISHABLE IN THAT THERE THE CLAIMS ARE FOR DAMAGES AND NOT FOR MONEY HAD AND RECEIVED.

These cases, as shown by the *Iten Biscuit Co. case*, are confined to the "shipper's right to damages for any pecuniary injury" resulting from the carrier's violation of the Act. The question decided was what are damages when there has been a violation of the Act. The cases do not involve, as this one here does, a claim for the excess as such paid over and above the maximum charge that could be legally collected. To recover such excess the common law action for money had and received must be instituted and the Commission has no jurisdiction over such a case. Thus the Commission could not have decided, and while its jurisdiction remains the same as it is now, never will decide, the question of the right to recover such excess as excess.

But if it be said that we use the word "damages" in a strained sense in making this distinction, still there is nothing inconsistent between the holding in the *Iten Biscuit Co. case* and the holding of the Minnesota Supreme Court in this case. In the *Iten Biscuit Co. case* the Commission said that where they had found a rate to be unreasonable and claim is made to recover damages on account of having paid such rate, "damage is established by the very circumstances of the case." So here, when the fourth section declares that there shall not be

charged more for a shorter than for a longer haul and it is made to appear that more was charged for a shorter than for a longer haul in that the rate from Benchland, the shorter distance, was more than the rate from Billings, the longer distance, damage to the extent of the difference in these rates is established "by the very circumstances of the case," and as said by this court in *Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U. S. 531, "the plaintiffs have paid cash out of their pockets that should not have been required of them and there is no question as to the amount of the proximate loss." The Commission has always recognized the correctness of the decision of this court in the case just cited, and in referring to that case in the *Iten Biscuit Co. case*, the Commission said: "In that case the reparation was awarded for the payment of an unreasonable rate." No valid distinction can be made between the *Darnell-Taenzer Co. case* and the case here. If in the case here the Commission had determined upon investigation that the Benchland rate was unreasonable to the extent of the difference between that rate and the Billings rate, then in recovering such difference it would not be necessary to prove damages under the decisions of this court or of the Commission. It therefore follows that where the same determination is made by the application of the rule of law fixed by the long and short haul clause, it is likewise unnecessary to prove damage to recover such difference. This case proves itself.

NO FEDERAL STATUTE OF LIMITATIONS IS INVOLVED.

The only federal statute of limitations which petitioner claims controls is in the Interstate Commerce Act, but it appears from the portion of Sec. 16 thereof, which petitioner quotes in its brief, and which is all that is relied upon in support of its contention, that this section is confined to the filing of complaints with the Commission for the recovery of damages and to the filing of petitions in courts to enforce orders of the Commission for the payment of money. This action thus does not come within the provisions of this section. This is an action in a state court and recovery is not sought upon any order of the Commission for the payment of money but upon the rule of law established by Sec. 4 as to what shall be the maximum rate for the shipments involved. Hence it logically follows that as this is an action for money had and received, the statute of limitations of Minnesota, where the action was brought, controls. (*Kansas City Southern Ry. Co. v. Wolf*, (C. C. A), 272 Fed. 681) Whatever may be said of the desirability of having a uniform statute of limitations applicable to this kind of an action wherever brought, the remedy must be provided by amending this act. The argument of the petitioner should therefore be presented to Congress and not to this court.

This court has never held that Sec. 16 of the Act applies to an action of this kind. The case of *Phillips v. Grand Trunk Western Ry. Co.*, 236 U. S. 662, the only case relied upon by petitioner, is

readily distinguishable in that in that case recovery was sought upon an order of the Commission for the refunding of money collected by a carrier to the extent the Commission had found the rate charged to be unreasonable.

Distinguishing the *Phillips case,* the Circuit Court of Appeals for the Ninth Circuit, in the case of *Davis, Agent, v. Parrington,* 281 Fed. 10, after pointing out that the *Phillips case* belonged to the class of cases which had to be instituted primarily before the Commission, said:

> "Such a proceeding was instituted by one of the plaintiffs before the Commission, and the rate therein involved had been held to be unreasonable. Then, after the Commission rendered its decision, Phillips commenced a direct proceeding in court, based upon the finding of the Commission in the other proceeding. The court treated the inquiry and the finding of the Commission as general in its operation, and held that the proceedings inured to the benefit of persons having similar claims to those presented by the other persons, and that such others, after the decision of the Commission, could sue directly in court, and that all persons who were required to go before the Commission primarily were affected by the statute of limitations as applied to the originator of the proceeding before the Commission. We do not understand the decision as holding that the statute limits the proceedings before courts for the recovery of damages for violation of the Interstate Commerce Act."

If this statute does not apply to an action for the recovery of damages for a fourth section violation where the right of recovery is not based upon an order of the Commission, *a fortiori* the statute does not apply to an action for money had and received to recover what has been collected in excess

of the maximum charge that could be legally made. In effect this is an action to recover an overcharge, and just as state statutes of limitation unquestionably apply to actions on overcharge claims, so such state statutes of limitation should apply to actions of this kind. Otherwise, we submit, this court would not have sustained a recovery in either of the cases of *Penn. R. R. Co. v. Puritan Coal Co.*, 237 U. S. 122, or *Penn. R. R. Co. v. Sonman*, 242 U. S. 121. According to the petitioner, the limitation provided by Sec. 16 not only bars the remedy but destroys the liability, and yet in the first of the two cases just cited this court allowed a recovery on claims originating in 1902, although the action was not commenced until March, 1908, and in the second case, while the date of the commencement of the action is not shown, it appears from the first paragraph of the opinion that claims were permitted to be recovered for a period of four years beginning April 1, 1903.

MOVEMENT OF A SHIPMENT FROM A FARTHER POINT HAVING A CHEAPER RATE IS NOT AN ESSENTIAL ELEMENT OF CASE.

Sec. 6 of the Act provides:

> "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unles the *rates*, fares and *charges* upon which the same are transported by said carrier *have been filed and published* in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different

> compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

By this section the establishment of a rate establishes the charge. The charge is not brought into existence by the movement of a shipment. The charge exists before the shipment is ever made. By examination of the tariff the shipper can ascertain the charge from a given point and can rely upon the rate shown in the tariff as being such charge without first ascertaining whether a shipment to which said rate is applicable has ever moved from such point. It was for the purpose of establishing such certainty that Sec. 6 was enacted. The words "rates" and "charges" are clearly synonymous. This appears from the second proviso of Sec. 4 which reads:

> "No rates or *charges* lawfully *existing* at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act."

It is incongruous to speak of a charge as existing if it refers only to actual transactions as contended by petitioner. To lawfully exist a charge must be established. It can be established only by filing and publishing a rate. The existence of a charge connotes a continuance thereof as shown in

the *Louisville & Nashville Ry. Co. case, supra.* Therefore the establishment of a rate is the establishment of a charge, and the continuance of a rate is the continuance of the charge of that rate.

If Secs. 4 and 6 of the Act are to be given a harmonious construction, the word "charge" in the long and short haul provision must be construed in the same sense in which the word "charges" is used in Sec. 6, as in the fourth section Congress must have had in contemplation the rate filed and published which, until so filed and published, under the express provisions of Sec. 6, does not become a charge, and the date on which it becomes a charge is not fixed by the date on which the first shipment moves taking such rate, but by the date designated by the carrier as the time the tariff containing such rate is to become effective.

The alternative provision in Sec. 4 making it unlawful to charge or receive a higher rate for a shorter than for a longer haul shows that its application is not limited to cases where there has been actually received a higher rate but also applies to cases where a higher rate is charged, and as above shown, a rate is charged as soon as it is established.

It is the filing and publishing of the Billings rate, and not the movement of a shipment from Billings, that gives the shipper from Benchland the right to have his shipment hauled at that rate. The only point from which a shipment must move to prove a violation, is from Benchland.

Certainly if the tariff contained a cheaper rate for the same commodity for a longer than for a

shorter distance, the carrier would not contend before the Commission that such was not a violation of the long and short haul provision and that the Commission could not compel a change in such rates so as to make them conform to the rule established by the long and short haul clause until it is shown that shipments have been made from both the farther and the intermediate points.

In the case of *Missouri & Kansas Shippers' Ass'n. v. M. K. & T. Ry. Co.,* 12 I. C. C. 483, cited by petitioner as holding that a rate is a paper rate until a shipment taking such rate has actually been made, the report of the Commission shows that even the carrier did not know that the cheaper rate relied on by the shipper had ever been published. Without it clearly appearing to the contrary, it should not be assumed that in the case cited the Commission undertook to override the express provision of Sec. 6 that a carrier, in making its charges, is limited to the rates filed and published. (*Beeghly v. Public Utilities Commission,* (Ohio) 135 N. E. 641)

The other case cited, *S. J. Greenbaum Co. v. Southern R. R. Co.,* 38 I. C. C. 715, involves a claim for damages based upon a rate found by the Commission to be discriminatory, and the Commission correctly held that claimant could show no damages without first showing that a shipment actually moved at the lower rate from the point alleged to have been unlawfully favored. The decision is merely in accordance with the decision of this court in *Penn. R. R. Co. v. International*

Coal Company, 230 U .S. 184. In the *Greenbaum case* no fourth section violation was involved.

THE CASE OF DAVIS, AGENT, V. PORTLAND SEED COMPANY, IN WHICH THIS COURT GRANTED A PETITION FOR A WRIT OF CERTIORARI, IS DITINGUISHABLE IN THAT IT IS AN ACTION FOR DAMAGES AND WAS BROUGHT IN A FEDERAL COURT.

The case cited in the above heading is a companion case to the case of *Davis, Agent, v. Parrington,* both of which cases were decided together by the Circuit Court of Appeals for the Ninth Circuit. (281 Fed. 10) The former case is now pending in this court on writ of error, (No. 595 on the docket for the October term, 1922), and the latter on writ of certiorari. (No. 573 on the same docket) The latter case involved less than $1,000.00. Hence it could not be reviewed by this court on writ of error, (Sec. 240, Jud. Code), and the petition therein for a writ of certiorari was not resisted. Both cases are based upon Sec. 8 of the Interstate Commerce Act providing for the recovery of damages, including an attorney's fee, by the shipper where the carrier has violated the provisions of the Act, and for the recovery of which damages a federal court, Sec. 9 of the Act provides, is the only court in which an action may be brought. In the cases cited the Circuit Court of Appeals held that where more has been charged for a shorter than for a longer haul in violation of Sec. 4, "there is a remedy by action *in damages* in court," citing

Sec. 9, and as a part of such damages the court allowed the recovery of an attorney's fee under the provisions of Sec. 8.

Thus in these two pending cases the question presented is what constitutes damages where there has been a fourth section violation, while here the question involved is the right to recover *as money wrongfully collected* the difference between the rate paid and the rate that would have been paid if the shipment had moved for a longer distance, namely, from Billings, in excess of which latter rate the carrier could not lawfully charge under the long and short haul provision. No attorney's fee was asked for or allowed here.

This court can grant a petition for a writ of certiorari in any case brought in a federal court, where the above cited cases were brought, when a writ of error cannot issue, regardless of the nature of the question involved, (Sec. 240, Jud. Code), but in no case is the discretion of this court to be appealed to for the granting of a writ of certiorari to a state supreme court unless the petitioner claims that the lower court passed upon some right, title, privilege or immunity claimed by the petitioner under the federal constitution or some treaty or statute of the United States. (Sec. 237, Jud. Code)

In an effort to come within this limitation the petition here is drawn on the assumption that this is an action for damages and that the difference between the rates for the shorter and longer distances was held here, as in the *Portland Seed Company case,* to be the measure of damages. But it ap-

pears from the decision of the state supreme court that this case is, and was decided as, an action for money had and received. The court held that not more than the Billings rate could lawfully be collected under the fourth section on shipments from Benchland and therefore allowed a recovery of the difference between the Benchland and Billings rates as so much money wrongfully collected. The decision goes no farther.

CONCLUSION

Inasmuch as this petition is addressed to the discretion of this court it would seem that there is no occasion to grant it unless there is assigned as error the holding of the lower court in respect to some right, title, privilege or immunity claimed by the petitioner under the Interstate Commerce Act and there is reasonable ground for contending that in such respect the decision is erroneous. Only four errors are assigned. (pp. 9 & 10) An examination of them discloses either that no such right, title, privilege or immunity was passed upon, or that if it was, clearly that which is assigned as error is not error.

1. As we have shown that this a common law action for money had and received, which remedy is expressly preserved by Sec. 22 of the Act, the state court undoubtedly had jurisdiction thereof.

2. Sec. 16 of the Act contains no provision whatsoever making the period of limitations therein provided applicable to such an action as this and this action is not barred under the Act.

3. The court did not err in holding that the Benchland rate was unlawful (a) notwithstanding it was not shown that a shipment had moved from Billings, the longer distance, at the cheaper rate, and (b) notwithstanding petitioner had made application to the Commission for permission to charge a lower rate from Billings. Sec. 4 does not contain any provision that a higher rate for a shorter distance is unlawful only when a shipment has been made at a cheaper rate for a longer distance. That the mere application to charge a cheaper rate from Billings gives the right to do so before the application is granted by the Commision, is so frivolous that it is not even argued by petitioner. The shipments in question moved in 1913 and 1914, which was long after the expiration of six months from the passage of the Act of June 18, 1910, which was the time allowed to continue to charge a cheaper rate for a longer than for a shorter distance.

4. As this is an action for money had and received it was properly decided as such. The question of whether any damage was sustained by reason of the violation of Sec. 4 was not involved. To justify the court in refusing to dismiss the action it was necessary to prove only that more was collected than the law permitted to be collected.

It is respectfully submitted that the petition should be denied.

FREDERICK M. MINER,
JOHN P. DEVANEY,
DEWITT CLINTON EDWARDS,
WALTER W. PATTERSON,
Attorneys for Respondent.

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No. 820

JAN 29 1923
WM. R. STANSBU

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

McCAULL-DINSMORE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT OF SAME.

F. G. DORETY,
R. J. HAGMAN,
Attorneys for Petitioner,
1120 Great Northern Bldg.,
St. Paul, Minnesota.

January 15, 1923.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

McCAULL-DINSMORE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

To the Honorable The Supreme Court of the United States:

The Great Northern Railway Company, the petitioner above named, respectively prays your Honorable court to require, by writ of certiorari or otherwise, that there be certified to your court, for review and determination, that certain cause entitled McCaull-Dinsmore Company, Respondent,

vs. Great Northern Railway Company, Appellant, bearing Docket No. 23141 in the Supreme Court of the State of Minnesota, wherein a final judgment has been rendered by said Supreme Court of the State of Minnesota on December 15, 1922.

The said cause involves several questions as to the construction of Section 4 and other sections of the Interstate Commerce Act of the United States, the one of greatest public interest being the question whether a shipper of interstate freight who has paid a charge for a shorter haul, which charge is reasonable *per se* but is higher than one published for a longer haul in the same direction and over the same line, can recover the excess without proof that he has suffered damage other than the mere payment thereof. The Interstate Commerce Commission has consistently held in the negative in a long series of decisions, of which the best known and most fully discussed is that of Iten Biscuit Co. v. C. B. & Q. R. R. Co., 53 I. C. C. 729. The decisions of the Commission in these cases are based upon the principle established by this court in the case of Pennsylvania R. Co. v. International Coal Co., 230 U. S. 184. The Supreme Court of Minnesota in the cause at bar has held to the contrary and sustained a recovery by a shipper in such a case, one justice dissenting and indicating a willingness to follow the contrary rule which has governed the decisions of the Interstate Commerce Commission. The present situation is, therefore, that a shipper who goes before the Interstate Commerce Commission to recover reparation in the

case of a violation of the long and short haul clause cannot recover, but if the same shipper goes before the Minnesota courts on the same cause of action he can recover.

On November 13, 1922, this court in your Docket 573, issued a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit in the case of Davis, Agent vs. Portland Seed Co., decision in which was reported in Vol. 281 Fed. 10, and which also sustained the right of recovery of reparation under the long and short haul clause, this view being contrary to the well established rule of the Interstate Commerce Commission and contrary, as we believe, to the ruling of this court in the International Coal Company case, *supra*.

If the decision of this court upon the return to said writ should result in a reversal of the judgment of the Circuit Court of Appeals, such decision would in principle require a reversal of the decision of the Supreme Court of Minnesota in the cause at bar; but unless a writ is granted in this cause said judgment will forthwith become enforcible and your petitioner will be compelled to pay the same and will have no redress and no means of recovering such payment.

The cause at bar involves only $596.00, but similar cases are pending against your petitioner in the District Court of Hennepin County, Minn., brought by the same attorneys, which with interest now involve over $43,000.00; and the parties have stipulated that the final judgment in said actions shall be entered in conformity with the final judg-

ment in the cause at bar. It follows that unless writ is granted in this cause, your petitioner w have been compelled to pay the sums demanded all of said actions, aggregating over $43,000.00, and if your judgment in Davis, Agent v. Portland Seed Co. shall, as we believe that it should, result in establishing the impropriety and unlawfulness of such payments, your petitioner will nevertheless have no redress and no means of recovering the same, and the shippers will have received large rebates from their lawful freight payments, contrary to law.

Your petitioner is a corporation and a common carrier by railroad between points in Montana and in Minnesota. Respondent, between August 26, 1913, and September 30, 1914, shipped 37 carloads of wheat from petitioner's station of Benchland, Mont., to Minneapolis and Duluth, Minn., at the published tariff rate of 36 cents per cwt. Petitioner's same tariff carried a rate of 28 cents per cwt. from Billings, Mont., a more distant point, which was published to meet and compete with a rate of the Northern Pacific Railway Company which had a much more direct and shorter haul from Billings to the same Minnesota destinations. Although 30 cents, the amount paid, was the published rate from Benchland, the respondent alleged in said action that 28 cents, the rate from the more distant point of Billings, was the lawful rate, and prayed for a refund of the difference of 2 cents per cwt. The cause was brought in the District Court of the Fourth Judicial District, Hennepin County,

Minn., and judgment for plaintiff therein was affirmed by the Supreme Court of Minnesota on December 15, 1922.

Your petitioner as the defendant in said action claimed the following rights, privileges and immunities under statutes of the United States:

1. Your petitioner claimed and set up by affirmative defense in its answer that the charges collected by it were its lawfully published tariff charges, which it was privileged to collect and retain under the provisions of Section 6 and other provisions of the Interstate Commerce Act of the United States.

2. Petitioner claimed that while Section 4 of the Interstate Commerce Act makes it unlawful to charge and receive more for a shorter distance or less for a longer distance, it does not fix the lawful rate in either case; that no lawful rate had been fixed or existed in the case at bar; that the determination of a lawful rate is a prerequisite to an action for refund and is an administrative function and not judicial. Petitioner, therefore, claimed that the court had no jurisdiction of this cause, and that it was entitled to a dismissal of the action under the terms of the Interstate Commerce Act. This claim was presented to the court by paragraph I (c) 4 of the petitioner's motion for amended findings, (page 34 of the printed record in the state court) and by paragraph I (a) of petitioner's assignments of error, and by briefs.

3. Petitioner claimed that the unlawfulness declared by Section 4 of the Interstate Commerce Act is analogous to the unlawfulness declared by Sections 2 and 3, and that under the provisions of said Act as construed in the case of Pennsylvania R. Co. v. International Coal Co., 230 U. S. 184, such unlawfulness does not give rise to a cause of action for damages without proof that the shipper has sustained damage other than by the mere payment of the unlawful rate. This claim was set up in paragraph I (b) 13 and (c) 2 of petitioner's motion for amended findings, (page 34 of the printed record in the state court) and in paragraphs I (c), II 13 and III 2 of petitioner's assignments of error.

4. Petitioner claimed that said action was barred by Section 16 of the Interstate Commerce Act, as construed in Phillips v. Grand Trunk Western Ry. Co., 236 U. S. 662, fixing two years as the statute of limitations for actions to recover freight charges collected in violation of the Interstate Commerce Act. The cause of action at bar accrued in 1914 and the action was not commenced until August, 1920, nearly six years thereafter. Petitioner, therefore, claimed immunity from suit under said Section 16, which claim was set up in paragraph IV in its assignment of errors.

5. Petitioner claimed that this was an action for violation of the Interstate Commerce Act brought under Section 9 of said Act, and that it was not a common law remedy which was pre-

served to the plaintiff under Section 22 of said Act; and that under Section 9 jurisdiction is conferred exclusively upon the Interstate Commerce Commission and the Federal courts, and that if this cause could be the subject of court jurisdiction at all the jurisdiction should be that of the Federal and not of the state court. Petitioner, therefore, claimed immunity from suit under Section 9, which claim was set up in petitioner's motion for amended findings and conclusions of law and in its assignment of errors and by brief.

6. While it was admitted in said action that petitioner had *published* a lower rate for a longer distance than the rate collected from Benchland, there was no evidence or claim that it had ever "charged or received" such lower rate, or that any freight had ever moved over the longer distance at the lower rate. In other words, the lower rate was a "paper" rate and petitioner, therefore, claimed and still claims that the collection of the freight charges in question were not in violation of Section 4 of the Interstate Commerce Act or of any other statute, and claimed immunity from recovery or refund under said statute, which claim was set up in paragraph I (b) of petitioner's motion for amended findings and conclusions (page 33 of printed record) and in assignment of error No. II.

7. Petitioner claimed that the rates in question from Benchland, Mont., were lawfully existing on June 18, 1910, the date of the amendment to Sec-

tion 4 of the Interstate Commerce Act, upon which this cause of action was predicated, and that an application had been filed by petitioner with the Interstate Commerce Commission within six months after the passage of said amendment for authorization "to continue class and commodity rates" on certain freight, including grain from Billings, Mont., to St. Paul, Minn., lower than the rate from Benchland and other intermediate points. The precise facts of the situation are stipulated in paragraph Ninth of the stipulation of facts (pages 12 to 14 of the printed record). This application remained undetermined by the Commission at the time the shipments in question moved, but was subsequently rejected by the Commission in the case of the grain rates, on the ground that the Billings rate on grain had not been reduced below the intermediate basis until after the petitioner's application was filed before it. Your petitioner nevertheless claimed in this cause that its said application was sufficient as a matter of law to comply with the requirements of Section 4, as amended June 18, 1910, and claimed immunity from recovery or refund under said statute, which claim was set up by petitioner in said stipulation of facts and by brief before the lower court.

The decision both of the District Court of Hennepin County and the Supreme Court of the State of Minnesota was against each of the aforesaid rights, privileges and immunities claimed by your petitioner, and the said Supreme Court of the State

of Minnesota is the highest court in said state wherein a final judgment in said cause could be had. The facts stated in this petition will more fully appear from the certified copy of the transcript of the record in said cause, which is filed herewith.

Your petitioner avers that the said Supreme Court of the State of Minnesota, as well as the District Court of Hennepin County, Minnesota, erred

(1) In assuming jurisdiction of said action and in assuming the right to determine a lawful rate applicable to the shipments in question other than the rate set forth in petitioner's tariff.

(2) In failing to hold that said action was barred by Section 16 of the Interstate Commerce Act.

(3) In failing to hold that the rate in question was not unlawful under Section 4 of the Interstate Commerce Act, because

(a) Petitioner had not charged or received but had only published a lower rate for a longer distance.

(b) The publication of said lower rate was protected by application before the Interstate Commerce Commission for lawful authorization filed as required by Section 4 of the Act and undetermined at the time of the collection of the charges in question.

(4) In failing to dismiss the action upon the ground that the respondent had not suffered any damage as the result of the alleged violation of Section 4.

Your petitioner has herein no right of appeal to or writ of error from this honorable court. Your petitioner presents herewith as a part of this petition a brief showing more fully its view upon the questions involved, and also a certtified copy of the entire transcript of record in the said case, including the proceedings in the said Supreme Court of the State of Minnesota, marked Exhibit "A".

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to the Supreme Court of the State of Minnesota, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Minnesota, and of the District Court of Hennepin County, Minn., in this case, to the end that said cause may be reviewed and determined by this court, as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appropriate, and, that the said judgment of the said Supreme Court of the State of Minnesota may be reversed by this honorable court.

Respectfully submitted,

F. G. DORETY,

R. J. HAGMAN,

Attorneys for Petitioner.

STATE OF MINNESOTA,
County of Ramsey.—ss.

F. G. Dorety, being first duly sworn, deposes and says that he is one of the attorneys for the petitioner named in the above and foregoing petition, and that said petition is true to the best of his knowledge, information and belief. That this petition is made in good faith and not for the purpose of delay.

F. G. DORETY.

Subscribed and sworn to before me this 15th day of January, 1923.

EARLE W. McELROY,
Notary Public, Ramsey County, Minn.
My Commission Expires Feb. 23, 1925.

(SEAL)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

McCAULL-DINSMORE COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ASSIGNMENT NO. 1—THE COURT HAD NO JURISDICTION.

Section 4 of the Interstate Commerce Act, as amended June 18, 1910, and so far as pertinent in this proceeding, reads as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the

same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further,* That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission. * * * "

The respondent (plaintiff below) claims that Section 4 of the Interstate Commerce Act should be construed as though it read as follows:

> "Whenever a carrier charges more for a shorter distance than for a longer distance, the rate in effect at the more distant point

> shall be the lawful rate or maximum rate at all intermediate points."

and that since 28 cents was the published rate at the more distant point of Billings, therefore it was the maximum lawful rate at the nearer point of Benchland, and as the carrier collected 30 cents, there was a straight overcharge of 2 cents for which action would lie in court without proof of any other damage. This construction supposes that the lower rate at the more distant point is an entirely lawful rate in itself and that it also functions as the measure of the rate at intermediate points.

Petitioner claims that the statute is in the nature of a discrimination statute; that a higher rate at a nearer point creates prejudice and a lower rate at a more distant point creates a preference and that both are equally unlawful; that the lower rate at the more distant point is neither a lawful rate at that point nor a proper measure of the rate at the nearer point; that there is no lawful rate at either point, and that no action for a refund can be brought in court until a lawful rate has been established by the Commission.

If Congress had intended to make the lower charge at the more distant point the lawful rate or the maximum rate at all intermediate points, it certainly could have said so much more clearly. The fact that it did not expressly say so gives rise to doubt as to whether it intended any such thing.

Further doubt will arise when we note the proviso in Section 4:

> "That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge *less* for *longer* than for shorter distances," etc.

It will be noted that the authority which the carrier is to apply for here is authority to charge *less* for a *longer* distance, thus implying that without such authority the smaller charge for the longer distance would be unlawful. In other words, Congress evidently regarded the lower rate for the longer distance as being just as unlawful as the higher rate for the shorter distance. It was evidently considered immaterial whether the prohibition were directed against a higher rate for a shorter distance or against a lower rate for a longer distance. The two are regarded as having the same effect and as being interchangeable.

We can get a pretty fair test of the soundness of the respondent's reasoning if we assume that the prohibition were directed expressly against the lower rate for the longer distance. If the statute declared it unlawful to charge less for a longer than for a shorter haul, then, under respondent's reasoning, the higher rate for the shorter haul is a lawful rate. Only the lower rate for the longer haul would be unlawful. The statute would fix the higher and shorter rate as the minimum for the longer haul and if the carrier collected less it would have an action in court for a straight undercharge.

This reasoning is identical with that upon which the court below awarded judgment against us, but we venture to assert that if the very same reasoning were advanced by a carrier in a case of that sort, the Supreme Court of Minnesota would be the very first to repudiate it. Under a statute so worded, everyone would agree, we think, to the sort of construction which we are advocating here, that is, that the effect of the statute would be to declare an unlawful prejudice at the nearer point and an unlawful preference at the farther point, both being equally unlawful. It would be clear that the unlawfulness would inhere as much in one rate as in the other.

It is our contention that, whichever way the statute be worded, it should be construed as declaring it unlawful to charge more for a shorter or less for a longer haul.

Undoubtedly, Congress had the *power* to enact such a statute as this; and undoubtedly, under such a statute the carrier could neither apply a shorter and higher rate as lawful at the more distant point nor the lower and longer rate as lawful at the nearer point. There could be neither a straight overcharge at the nearer point nor a straight undercharge at the farther point. Under such a statute there would be no lawful rate at either point, and a shipper alleging a charge actually collected to have been unlawful, would be compelled, under the doctrine in Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, to apply to

the Commission to fix the lawful rate, and could not recover any alleged overcharge in court.

Respondent's theory that the fourth section should be construed as making the published rate from the more distant point the lawful rate from the nearer point and that any payment in excess of the rate from the more distant point is a straight overcharge, just as though the tariff called for 50¢ and the railway agent through error collected 60¢, and can be recovered in court without first resorting to the Commission, results, of course, in the *lawful* rate from the more distant point and the nearer point being the *same*. In other words, the carrier would receive as great compensation for the shorter as for the longer distance. Such a construction of the fourth section is utterly irreconcilable with the language of that part of the fourth section indicated in italics below:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, *but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance.*
> * * * "

The italicised language of the fourth section quoted above we believe presents not only a cogent reason why the construction given the fourth section by the Minnesota Supreme Court and by respondent is untenable, but supports our contention that where more has been charged for a shorter than for a longer haul in violation of the fourth section Congress did not fix a lawful rate by legislative mandate but intended that the lawful rate from both the more distant and the nearer points should be fixed by the Commission in the exercise of its administrative functions, as is the case where a rate has become unlawful because of the provisions of section 2 or 3 of the Act.

We believe that these illustrations will suggest a question at least as to whether this was not the real intention of Congress and whether the statute as actually worded should not be construed as making both rates unlawful, and as leaving both points without any lawfully published rate.

We have already pointed out four reasons which would support this construction:

1. That the statute does not *expressly* declare the lower and longer rate to be the lawful rate at the intermediate points.

2. That the proviso requiring authority for publishing a lower rate at a more distant point implies that the lower rate as well as the higher would be unlawful in the absence of special authority.

3. That the same reasoning which would require application of the lower rate as the lawful rate at intermediate points would, if the wording were reversed, require application of the higher rate at the more distant point.

4. That the fourth section itself specifically provides that that section shall not be construed as authorizing a carrier to charge or receive as great compensation for a shorter as for a longer distance. There is no prohibition against a carrier publishing such rates in the first instance or against the Commission establishing such rates, but the fourth section makes it clear that the fourth section itself is not to be taken as bringing about such a situation.

In addition to these four reasons there are other considerations which would seem to require that the statute be construed as declaring both rates unlawful.

1. This would be in accord with the rate regulating policy of Congress as indicated in other sections. It is the policy of Congress upon declaring a rate unlawful, not to fix the lawful rate by legislative mandate, but to have it fixed by the Commission. Thus, under Section 3, where two rates exist, one preferential to point A and the other prejudicial to point B, the lower rate at point A is not made the lawful rate at point B, but the whole matter is left to the Commission to remove the unlawfulness, either by lowering the higher rate or raising the lower rate, or both.

Congress recognizes throughout the balance of the act that the fixing of lawful rates is an administrative function and confides the exercise of that function solely to the Commission. To warrant the conclusion that Congress in Section 4 adopted the opposite policy of fixing the intermediate rates by legislative mandate should require an express declaration that the lower rate should be the lawful rate at intermediate points. If such had been its intention, it would have been very easy to say so instead of leaving the matter to implication.

2. It must be borne in mind that Section 4 is only one of the rate regulating sections: it should be construed together with others. Congress has declared that in order to be lawful a rate must be be

(a) Reasonable under Section 1.

(b) Non-discriminatory under Section 2.

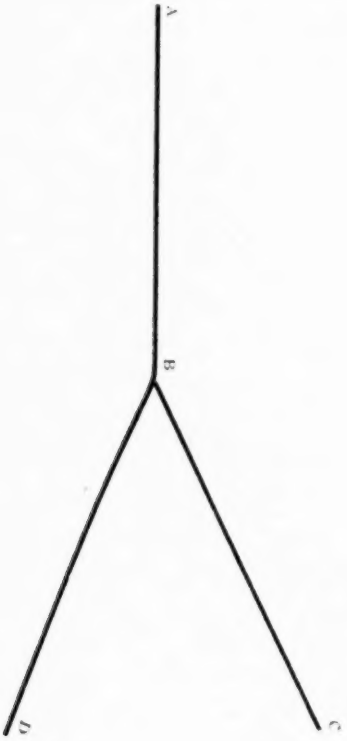
(c) Non-prejudicial under Section 3.

(d) Not in excess of longer rates under Section 4.

The lawful rate is clearly a rate that complies with all four of these requirements. There are four limitations within which the rate must come. That prescribed by Section 4 is only one of them, and to hold that Congress meant to establish the Section 4 limitation as the lawful rate, or even as the maximum rate, is to ignore the other limitations. It is much more reasonable to suppose that, upon exceeding any one or more of these limitations, *the entire rate*, and not merely the excess over the

limitation, would be unlawful, and would require administrative action by the Commission.

3. There are practical difficulties in the application of the other construction of the statute. Suppose, for instance, a situation like that shown in the following diagram: The rate A-B being 30 cents, the rate A-C being 28 cents, and the rate A-D being 27 cents.



Suppose a shipper at B discovers the 28 cent rate at C and recovers the 2 cent excess in court on the theory that the rate at C is the lawful rate at B. Suppose later he discovers a 27 cent rate at D and brings another action. The court, having first found 28 cents to be the lawful rate, would undoubtedly have to reverse itself and declare 27 cents to be the lawful rate. The difficulty in establishing lawful rates by legislative mandate in this way, contrary to the rate published in the tariff, is that different shippers may discover different and varying Fourth Section violations at the same point, and there is no fixity in the rate. The court may have discovered the lowest rate for a longer distance, or it may not.

Even without this complication, there may be important reasons why the rate at point B should not be made either 28 cents or 27 cents. There may be a nearby offline point where the rate is 30 cents, so that a 27 cent rate at B would create a preference. This situation should be considered in determining the lawful rate at B. Such a situation illustrates the ramifications which exist and which must be considered in rate making, and which prove the necessity for administrative action.

The fact that unlawfulness may arise from and inhere in the lower rate at the more distant point is well illustrated in the present case. The record shows that there was a rate of 30 cents at both Benchland and Billings in 1912, i. e., the same rate which is now complained of at Benchland was then

in effect and was perfectly lawful. The alleged Fourth Section violation arose not by any change in that rate, or in the circumstances surrounding it, but from a *lowering of the more distant Billings rate*, and the violation was subsequently removed by raising the Billings rate back again to its former level. In other words, the act which brought on the alleged unlawfulness and which later removed it again was not any change in the rate which is complained of but was a change in the more distant rate, which certainly lends color to the contention that the unlawfulness inheres at least as much in the lower rate for the longer haul as in the higher rate for the shorter haul.

We believe that it will be apparent from these simple illustrations that the whole problem of fixing lawful rates under the Fourth Section is an administrative one and must necessarily be so. Congress simply declares the unlawfulness and this unlawfulness inheres in every part of both rates and not alone in the excess in the intermediate rate. Congress does not provide how the unlawfulness shall be removed; that must be determined by the Commission, and it may be removed, as in the case of any other preference or prejudice, by lowering the higher rate or raising the lower rate, or both. In the absence of an express declaration by Congress that the lower rate shall be the lawful rate at both points, we should not attribute to it, by implication, a declaration so at variance with its usual policy.

Assignment No. 4—No Recovery Without Proof of Damage.

If it be granted that the effect of Section 4 is to destroy both rates—so that there is no "lawful" rate at either point—the question arises whether a shipper who has paid a charge, named in a tariff, but not lawfully published, is thereby given a cause of action either in court or before the Commission. We believe the answer is that if he has sustained damage as a result of the unlawful act, he has a cause of action for such damage, the situation then being similar to that in the case of Pennsylvania R. Co. v. International Coal Co., 230 U. S. 184, where the plaintiff was charged more than a competitor for the same service. His charge was, therefore, unlawful, but in order to enable him to recover he was compelled to prove "damage" which might or might not be the amount of excess over what the competitor was charged.

Of course, if the rate were unreasonably high in violation of Section 1, i. e., if the shipper has paid all the service was reasonably worth and something in addition, he has paid something for nothing; money has been taken from him for which he got no return. And this, under the decision in Southern Pacific Co. v. Darnell-Taenzer Co., 245 U. S. 531, is damage *per se*. But in a Fourth Section case, if the charge paid was reasonable, i. e., if he got full value for his money, he cannot, under the International Coal Co. decision, recover some part of what he paid, merely because the rate paid was

an unlawful rate; he must go further and prove damage. In the case of McClelen et al. v. Southern Ry. Co. et al., 6 I. C. C. 589, 599, the Commission said with reference to the Fourth Section:

> "The exaction, without lawful excuse, of a greater compensation in the aggregate for the shorter than for the longer haul over the same line in the same direction, the shorter being included in the longer, which is forbidden by section 4 of the act to regulate commerce, is only a form of unjust discrimination or undue preference, to which, it seems, Congress desired to call particular attention because of its prevalence in certain sections of the country."

The principle of the International Coal Company case, *supra*, that recovery cannot be had without proof of damage where there has been a violation of the section prohibiting unjust discrimination, rather than the principle of the Darnell-Taenzer case, *supra*, permitting recovery without proof of damage where there has been a violation of the section of the act prohibiting unreasonable rates, we believe is applicable to a cause of action predicated on a violation of the fourth section.

In this connection we invite the attention of the court to the many decisions of the Interstate Commerce Commission applying the reasoning which we have been advancing and holding that a shipper who has paid more for a shorter haul cannot recover the excess by way of reparation without proving that he has been damaged by the lower rate charged for the longer haul.

Nix & Co. v. S. Ry. Co., 31 I. C. C. 145, 149.

Chattanooga Implement & Mfg. Co. v. L. & N. R. R. Co., 40 I. C. C. 146.

La Crosse Shippers' Asso. v. C. & I. L. Ry. Co., 43 I. C. C. 520, 524.

United States Glue Co. v. C. & N. W. Ry. Co., docket No. 6832, unreported.

S. J. Greenbaum Co. v. Southern Ry. Co., 38 I. C. C. 715.

Oregon Fruit Co. v. Southern Pac. Co., 50 I. C. C. 719.

Iten Biscuit Co. v. C. B. & Q. R. R. Co., 53 I. C. C. 729.

Illinois Brick Co. v. Director General, 57 I. C. C. 320.

The reasoning of the Commission in Iten Biscuit Co. v. C. B. & Q. R. R. Co., *supra*, displays such a thorough and scholarly consideration of the question and sets forth so forcibly the reasons upon which we are relying here that we take the liberty of quoting it at length:

> "With respect to the fourth section departures complainant insists that, regardless of the reasonableness of the rates from and to the more distant points, the rule of the fourth section is absolute, the collection of higher charges from and to Omaha was unlawful *per se*, and the excessive charges must as a matter of law be refunded.
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> "Distinction must be made between the carrier's unlawful act which renders it liable to prosecution, and the shipper's right to damages for any pecuniary injury occasioned thereby.

The original bill for an act to regulate commerce, which passed the Senate May 12, 1886, proposed, under Section 2, among other things, that a carrier violating the provisions thereof should be liable to respond in damages to the extent of the difference between the rate paid and the lowest rate charged upon like shipments; in section 3, after declaring unlawful any undue or unreasonable preference or advantage, it proposed to establish a cause of action in damages for violation of its provisions, but did not fix the measure of damages; and in section 4 the carrier was to be made liable to the person or persons against whom any excessive charges were made for all damages occasioned by a violation of the provisions thereof. But, as enacted, sections 2, 3 and 4 were amended by striking out the clauses giving right of action for damages, and section 8 was substituted as a general section covering the omitted clauses of the three sections. In commenting on this omission the Supreme Court in Penna. R. R. Co. v. International Coal Co., 230 U. S. 184, said at page 198:

"'The fact that this provision measuring the amount of recovery by rebate was omitted from the Act, as finally reported to both Houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes—not the report of the conference committee—but a statement made by a member of the Senate Conference Committee, to support the present argument that Sec. 8 means the same thing as the omitted clause. * * * Section 2 of the original Senate Bill said nothing about *damages*, but

in case of rebating gave a shipper a right, in the nature of an action, for a penalty to be measured by the difference between the lawful and the unlawful rate, whether damage resulted or not. That provision was stricken out and Sec. 8 of the Act, as passed by both Houses of Congress and approved by the President, gave a right of action for *damages* and attorneys' fees to "the person injured"—and, of course, to the extent of the injury.'

"In discussing in this case the civil side of the act, the court said:

"'On the civil side the Act provided for compensation—not punishment. Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in Parsons v. Chicago & N. W. Railway, 167 U. S. 447, 460, construing this section (8), "before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury." Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the Government.'

"While in that case the court was dealing specifically with rebating under section 2, the right of action for damages was under section 8, which applies alike to sections 2, 3 and 4, and what was there said is equally applicable to section 4.

"Before an award of reparation can lawfully be made, damages must be proven. Where the unlawful act was the collecting of a rate which

we find to have been unreasonable and more than just compensation for the service rendered, the Supreme Court has held, in effect, that damage is established by the very circumstances of the case. As was said in Southern Pac. Co. v. Darnell-Taenzer Co., 245 U. S. 531, 'The plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss.' But where the unlawful act was the charging of a higher rate for a shorter than for a longer haul, in violation of the provisions of the fourth section of the act, it does not follow that the higher rate was unreasonable or more than should justly have been required for the service performed. As we find was the fact in the present instance, the higher rate may have been reasonable *per se* and the lower rate too low. In such a case the violation should have been eliminated by raising the lower rate, and a complainant who paid the higher rate to or from the intermediate point would clearly not be entitled to reparation unless he could prove that the charging of the lower rate to or from the more distant point subjected him to prejudice and consequent damage. In this instance, as we have already seen, there is no such proof.

"It has been suggested that the decision of the Supreme Court in Southern Pac. Co. v. Darnell-Taenzer Co., *supra*, may support an award of reparation in this case without proof of damage. It has frequently been held that there is nothing in the act justifying a presumption of damage. In that case the reparation was awarded for the payment of an unreasonable rate and the question before the

court was 'whether the fact that the plaintiffs were able to pass on the damage they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers.' The court said that 'cases like Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations.'

"Obviously it would be inconsistent, and contrary to the intent and spirit of the act, to hold that to recover under sections 2 and 3 there must be proof of damage and under section 4 the departure therefrom is of itself proof of damage.

"We affirm our previous conclusion, and hold that in the absence of proof of the fact and amount of damage to complainant an unauthorized departure from the long and short haul rule of the fourth section of the act does not entitle complainant to an award of reparation."

It was argued below that if the respondent had conceded our conclusion that no lawful rate existed and had gone to the Commission to establish a lawful rate, the Commission could not, under Section 4, have established any higher rate than the more distant Billings rate of 28 cents. The answer to this, of course, is that, under our construction, unlawfulness arises from the comparative situation and inheres as much in the lower and more

distant rate as in the higher intermediate rate. For this reason the lower rate is itself unlawful and cannot be used as a measure of a lawful rate either for Billings itself or for Benchland. The Commission might, therefore, establish the lower rate at both points or the higher rate at both points or different rates at each point. If it should, after considering all of the sections of the statute, conclude that the 30 cent charge collected was reasonable (as is admitted here), but that because of other complications the lawful rate should be 28 cents, such a finding would be analogous to a similar finding under Section 2 or 3, in which a rate reasonable under Section 1 might be declared unlawful under Section 2 or 3 and the lawful rate fixed at a lower amount. In such a case the carrier might be subject to prosecution and the shipper would be entitled to any damages actually suffered. But, having received full value for his payment, and having paid no more than the service was reasonably worth, he could not, because the charge was an unlawful charge, recover any part of it, except to the extent that he had actually suffered damage. We believe that the same rule would apply to the shipment of a commodity for which a charge had been collected without any tariff rate whatever having been published. If the Commission finds that it was unreasonably high the shipper could recover the excess, but if the Commission finds that the service was reasonably worth the charge the shipper could not recover without proof of damage, even though the Commission

might find that the provisions of Sections 2, 3 or 4 required publication of a lower rate.

Respondent offered no evidence whatsoever that it had been damaged. It merely proved that it paid a rate of 30 cents on its shipments from Benchland, and that the railway company contemporaneously published a rate of 28¢ from Billings. There is no evidence that any shipments were ever made on the 28¢ rate from Billings.

We believe that the foregoing establishes our assignment of error (1) and (4) in our petition. These are the questions of greatest public interest involved in the case. The other questions are of less wide public interest and will be discussed only briefly.

ASSIGNMENT NO. 2—THE STATUTE OF LIMITATIONS.

Section 16 of the act reads in part as follows:

> "* * * All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after."

The two year provision applies specifically to complaints filed with the Commission, but in the case of Phillips v. Grand Trunk Western Ry. Co., 236 U. S. 662, an action had been brought in the Circuit Court of the United States for the Eastern

District of Michigan to recover the excess in a rate theretofore declared unlawful by the Commission. At page 666 the court says:

> "Under such a statute the lapse of time not only bars the remedy, but destroys the liability (Finn v. United States, 123 U. S. 227, 232) *whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction.* This will more distinctly appear by considering the requirements of uniformity which, in this as in so many other instances, must be borne in mind in construing the Commerce Act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. *To have one period of limitation where the complaint is filed before the Commission and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction;* or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others *would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished.*" (Italics ours.)

As plaintiff's cause of action is predicated on a violation of the long and short haul clause of the Fourth Section of the Interstate Commerce Act

and was not instituted until almost six years after the cause of action accrued, the rule above enunciated would require a dismissal of the action for the reason that it is barred by Section 16 of the Commerce Act.

ASSIGNMENT NO. 3.

The alleged violation was only a paper violation. It was not shown that any shipment had ever moved from Billings, the more distant point, at the lower rate, or that the carrier had "charged or received" a greater compensation for the shorter haul than it had actually "charged or received" for the longer haul.

In the case of Missouri & Kansas Shippers' Association v. M. K. & T. Ry. Co., 12 I. C. C. 483, the Interstate Commerce Commission said with reference to such a situation as we have here:

> "Although it is clear that the Class C rate was a paper rate only, so far as hay was concerned, and that the breach by defendant of the provisions of section 4 was therefore purely technical and in no sense substantial, the object of this petition is to take advantage of the situation and to secure reparation on shipments that moved to Kansas City while the defendant inadvertently permitted its tariffs to remain in that condition.
>
> "While its procedure is to some extent judicial in nature, the Commission is essentially an administrative body; and in the adjustment of contentious proceedings of this kind it ought

to examine into the real substance of the matter unembarrassed by considerations that are purely technical. Looking at the complaint from this point of view, it seems to us wholly without merit. We are unable to accept a merely theoretical or paper rate, for the longer haul, that has not been used and was unknown either to the defendant or to the complainant, until casually discovered after it had been the published rate for some years, as affording a just basis for an order for reparation on shipments made to an intermediate point at a slightly higher rate. This view of the matter is supported by the uncontradicted evidence of the defendant, tending to show that the Class C rate of 10 cents to St. Joseph was not a compensatory rate on hay, and by the complete failure of the complainant to show that the rate to Kansas City was in itself excessive. That issue although raised in the complaint was abandoned on the hearing."

A similar principle has been applied in discrimination cases. In S. J. Greenbaum Co. v. Southern R. Co., 38 I. C. C. 715, at 718, the Commission said:

"From the decision in the case cited (Pennsylvania R. Co. v. International Coal Co., 230 U. S. 184) it is apparent that in order to hold a carrier or carriers responsible in damages for unjust discrimination it must be affirmatively established, among other things, that traffic actually moved at the lower rate from the point alleged to have been unlawfully favored over the line of the carrier or carriers responsible for the discrimination."

Conclusion.

There can, we believe, be no doubt that this is a case in which a writ of certiorari may properly issue. Several different and distinct rights, immunities and privileges were claimed by petitioner (defendant below) under a statute of the United States and the decision of the highest court of the state was against each of said rights, immunities and privileges claimed. The technical grounds for the writ undoubtedly exist.

That the discretion of the court should be exercised in favor of granting the writ appears from the fact that a writ has just been granted on November 13, 1922, in your Docket 573, in the similar case of Davis v. Portland Seed Co., 281 Fed. 10. The outcome of the present case will control the payment or non-payment of over $43,000.00, and the writ should be granted in order to stay this payment until the decision upon the merits in the said case of Davis v. Portland Seed Co.

Apart from this, the question involved is of widespread and vital interest and is the subject of contrary decisions by the Interstate Commerce Commission on the one hand and by at least one Federal court and the state court in the present case on the other. The dispute and doubt existing should be set at rest. There should be a uniform rule made applicable by the high authority of this court to be applied by all lesser tribunals.

And finally, the rate regulating policy of the Commerce Act is at stake. The decision at bar

would destroy that policy by substituting a rate made by legislative mandate for rates made through the administrative functions of the Commission.

Because of these considerations we respectfully pray that a writ be issued as prayed for in the petition filed herewith.

Respectfully submitted,

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